

JOURNAL
OF
COMPARATIVE LEGISLATION
AND
INTERNATIONAL LAW

EDITED FOR
THE SOCIETY OF COMPARATIVE LEGISLATION

BY
F. M. GOADBY, Esq., D.C.L.

“Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ τ’ὀρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον.”—ARIST. *Pol.* II. I.

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DINNER TO LORD MACMILLAN.

THE Society held a Dinner at the Savoy Hotel on Monday, December 2nd, in honour of Lord Macmillan, who had recently returned from a visit to Latin America, which he paid in company with Sir Richard Redmayne, under the auspices of the Ibero-American Institute of Great Britain.

After the gathering had honoured the toast of the King, and the toast of the President of the Republic of Brazil, Lord Atkin proposed the health of :

THE GUEST OF THE EVENING.

LORD ATKIN said :

I have now the great pleasure of proposing the Toast of the Guest of the Evening, the Chairman of our Society and our friend, Lord Macmillan. (Applause.)

This dinner is held to celebrate a most interesting occasion. Lord Macmillan has returned from a pilgrimage. It is a pilgrimage, so I understand ; but what he could have taken in his scrip as a pilgrim baffles description. He has from time to time been acquainted with railways, finance, banking, street offences, industrial psychology, hospitals—I won't run through the whole list ; but what he did take out with him was that in which he excels. I do not say he knows more about it than he does about the other subjects, but he does know a good deal about it. He went out to talk about law.

Lord Macmillan went out to South America equipped with his own very special knowledge of law in Scotland, in England, and elsewhere, and also with a special experience which I know he feels to be a great advantage in that sphere—namely, the experience of sitting in the Privy Council. Indeed, it is rather difficult in a society which deals with comparative law and comparative legislation to ignore the position of a man who, like Lord Macmillan, is a member of the Judicial Committee and sits in a body which administers justice to four hundred million people and administers four or

five separate codes of jurisprudence, some of them dating from primæval times. That, at any rate, is a tribunal where you are obliged to study that which we know as comparative law—which is very often confused by legislation !

Lord Macmillan, in discussing matters with other lawyers abroad, probably came to the conclusion that there is an immense field common to every system of jurisprudence. I do not believe that the rights of ordinary individuals in their dealings with one another vary very much. Whatever system of jurisprudence you study, the ordinary rules of fair dealing between man and man—the ordinary rules of contract and of private wrongs—are much the same. If you start with the Pentateuch and make comparisons of it and the Hindu or the Mohammedan law, or any other branch of law, the probability is that the main differences will be in constitutional matters, and perhaps in administrative law, and I dare say to some extent in the law which pertains to real property. But whatever the actual system of law may be, there are the same eternal principles of justice which prevail in every country, principles which lawyers in every country are really anxious to carry out to the fullest extent. I do not believe that in any country there are really different ideals of justice.

How important it is that, there being such a strong community of interest, the representative lawyers should meet, transcending the boundaries of nationality, and be able to discuss amongst themselves common topics of law and justice ! These pilgrimages are not made—and I know that Lord Macmillan would be the first to say so—with a view to propaganda. They are not made with the object of teaching or preaching. They are made so that lawyers shall be able, in each country, to discuss those common topics which are of the greatest interest to the citizens of every country, and so that eventually they may understand one another and the difficulties that sometimes exist between nationalities may be smoothed over.

We could not have sent to foreign countries a worthier representative than Lord Macmillan. The only trouble that I think we feel at home is lest the sample should be deemed to be too good to be a representative of the bulk. It will certainly be extraordinarily embarrassing if the lawyers of South America should hereafter suppose that the rest of us are all of the same quality as Lord Macmillan.

Lord Atkin extended a warm welcome to Lord Macmillan, and to Senhor Don Régis de Oliveira and Senhora de Oliveira. He concluded :

We are giving this dinner to Lord Macmillan. He is the Chairman of our Society, and there are a great many of us here who do not really represent the Society, but who have come here anxious to record their appreciation of the work which a fine citizen has done in so many parts of the world and in so many spheres for the good of human kind. This Society is very much indebted to him, but I hardly know of any branch of human activity in this country in which Lord Macmillan has not played a prominent and useful part.

LAW AND LAWYERS IN LATIN AMERICA.

In reply to the toast,

LORD MACMILLAN said :

I read some time ago in a law book intended for laymen these significant words : " Judges are human beings." This was a startling but consoling announcement. But when the author went on to say, as he did, " Judges are human beings of more than average intelligence and knowledge," my opinion of the author reached a very high point. The particular judge who is standing here this evening as your guest would need to be either more or less than human not to be deeply moved by the kindness of your reception. Why I should have a dinner given to me merely because I have had a most delightful holiday passes my comprehension, and I can only take it as a token of your friendly goodwill.

My noble and learned friend—that is how we address each other in the House of Lords—has referred to some of the darker passages in my life, and has recalled some painful memories. I recollect that, after I had spent some time in investigating such repellent topics as street offences and lunacy and mental deficiency, I said to the Home Secretary of the day, " Could you not now give me something to inquire into about which I could speak to my wife at home ? " (Laughter.) Then the Chancellor of the Exchequer gave me Income-tax ! On this occasion, however, pleasanter and more recent memories are present to my mind, for I have just had what was probably the most interesting voyage, the most interesting exploration, I have ever made in my life. When Horace said that those who cross the seas change their sky only and not their soul—well, America had not been discovered in those days ! I found that to cross the equator and visit lands which for me had always been full of the romance of adventure and of the great enterprises of the early voyagers, countries which for me had an extraordinary fascination,

was a new experience of transcendent interest. It is true, as your Chairman has said, that primarily I was accredited to the legal fraternity and to the university representatives in the three Republics which I visited, but I was by no means confined to my professional brethren, and I had opportunities of making many friendships among all sections of the community.

So far as the law is concerned, I should like to say—and in this I am sure I am only giving expression to the experience of all of us in this room who have travelled—that the brotherhood of the law is a singularly—shall I say?—embracing brotherhood. Wherever one goes, to be a member of that great profession, to be dedicated at the altar of justice to the cause of the promotion of law and order, seems to be a sort of Open Sesame to all doors in every country. Justice is universal, and while its manifestations in different countries may vary in form or in formula, in substance and in truth they are the same, and the quest to which we are all dedicated is the same quest. Therefore, wherever we go in our wanderings through the world, we find that the warmest welcome is extended to us by our professional brethren.

But there is a special interest, and one which naturally anyone feels who is concerned with comparative law, in observing the differences as well as the resemblances between the legal systems of different countries—the differences in form and in procedure perhaps rather more than in matter. I should deplore the coming of a time when the world was all the same, when we had lost all our distinctive characteristics which give half the interest to life. Could you conceive of anything more devastating than a world composed entirely of Scotsmen? (Laughter.) Half the attraction, therefore, in visiting other countries lies in the study of the variety of their institutions. That great lawyer Montesquieu, in his *Spirit of the Laws*, said this :

Ce sont les différents besoins dans les différents climats qui ont formé les différentes manières de vivre ; et ces différentes manières de vivre ont formé les diverses sortes de lois.

To me it was of special interest to see in the great Republics of Argentina, Uruguay, and Brazil the genius of the law manifesting itself under different conditions, acclimatizing the old doctrines with which we are all familiar to new conditions, and evolving new developments to meet new needs. Just as literature and art vary in different countries according to the genius of the country, so also law takes on the characteristics of the people by whom it has been

framed. It is in those differences that the interest of the study of comparative law resides. To see some other system than your own throws up in relief the specialities of your own system. It is like learning another language : no one really knows the beauty of his own language until he has learned another. The other day a friend of mine at Oxford, a distinguished tutor there, said that he found even the study of Scots law instructive, because he was able to teach his pupils the doctrine of consideration in English law very much better when he had explained to them the contrasting Scottish system which knew it not. Thus while the study of other legal systems brings home to one the essential sameness which is behind all systems of law, at the same time it enables one to appreciate the fascinating interest of the local developments which have taken place in each country of the world.

The three great Republics that I visited were all most hospitable to me when I explained that I was a member of the legal profession and engaged in judicial work in this country. In the Argentine I had the pleasure of a most delightful time with the judges of the Supreme Court of Argentina, a court of five judges, who received me in their retiring room and with whom—despite certain slight linguistic obstacles—I managed to carry on a most instructive conversation. There we discussed the difference between the common law and the code law, and we found that, after all, we did not differ so very much at bottom. What especially impressed me was the great ardour for legal learning which I found in Buenos Aires. Studies in legal science are pursued in the University there with an enthusiasm which I have sometimes missed in this country. We are an essentially practical people, and perhaps for that very reason have not studied the science of law with quite so much attention. In Argentina there is one of the most active law schools I have ever come across, whose publications exhibit very advanced legal scholarship. As you know, the Argentine has a federal constitution, and so they have just the same kind of problems with which the United States of America have to deal and with which we have to deal in the Privy Council—questions as to the constitutional validity of legislation by the federal and state legislatures. I found their libraries admirably equipped with all the most modern legal literature, and my eye recognized many treatises, and volumes of reports with which I was only too painfully familiar.

Then when I passed to Uruguay I found there also in Monte Video a very lively and active law school. I paid a visit to the

doyen of the legal profession, Senhor Goyena, who was eagerly interested in all that was happening in this country and was most anxious to obtain from me information about our procedure and about our law. He informed me that in Uruguay they were afflicted with that most common affliction, from which all legal systems suffer and from which we are not entirely free in this country—namely, the law's delays and the law's expense. He said that they were addressing themselves to the task of procedural reform, and asked me if I would supply the lawyers of Uruguay with a complete series of papers showing the procedure in an English common law action and in an ordinary English criminal prosecution, in order that they might learn how we had solved our difficulties. I assured him that we had not completely overcome the difficulties to which he had alluded, but offered to place at his disposal any information I could give him. I lunched afterwards with the advocates of Uruguay. Lunching with advocates or barristers anywhere is always an enjoyable form of legal procedure, and I encountered at this symposium some most congenial brethren. At the end of the luncheon I found myself duly admitted a member of the Uruguay Bar. That was an honour and a token of goodwill which I highly valued. Apart altogether from the pleasure of their hospitality, we were also able to discuss a number of projects which may possibly bear fruit hereafter.

Then I passed to Brazil. It is not only because of the presence to-night of His Excellency the Brazilian Ambassador that I say that my visit to Brazil was the climax of my South American Odyssey. I went first of all to Sao Paolo, and found there an amazingly active community: a great city of a million inhabitants, with no unemployed, and humming with industrial life. The University of Sao Paolo, presided over by a distinguished lawyer, Senhor Porchat, is one of the most vigorous schools of learning I have ever visited. I had the largest audience at Sao Paolo that I had anywhere during my visit. I was told that in Brazil, if they found a speaker tedious, they just went out. I think I detected a little natural surprise in the remark that was made to me after my speech: "Not a single person left the room!" That, I understand, was the highest possible compliment you could receive from a Brazilian audience.

It really was, joking apart, extraordinarily heartening, and I was especially happy to find so much real appreciation of Great Britain and of all that she had done. Senhor Porchat on that

occasion was good enough in addressing me to use words which I should like to quote here :

The reputation of English law enforcement is such that all visitors to that country feel a particular sense of security that leads them to place British justice on a pinnacle as the symbol of the highest achievements in contemporary civilization.

That was, if I may say so, a very noble tribute, and one which, as representing for the moment my country, I was very proud indeed to receive from this distinguished lawyer of Brazil. (Applause.)

Then I passed to Rio de Janeiro, where there took place what I think was one of the most interesting episodes in the course of my professional life. The Corte Suprema of the United States of Brazil drew up a special protocol and commissioned three of the judges of the Supreme Court to receive me and to conduct me to a plenary session. They said that no Englishman—or Briton, let me say—had ever had this distinction conferred on him before. I accordingly attended this sitting of the Supreme Court at Rio along with His Majesty's Chargé d'Affaires—the Ambassador was away at the time—and was received by the Secretary of the Court and escorted to the audience chamber. There are eleven judges in the Corte Suprema, and they formed a most dignified tribunal. They are the inheritors of the ancient traditions of Portugal. Their costume, like the costume of some of our own judges, was of ecclesiastical origin, of black silk, rather like a soutane. They did not wear wigs, but they looked exceedingly impressive. The President, Dr. Edmundo Lins, then invited me to the top of the dais and directed me to take my place at his right hand. He then addressed to me an eloquent "allocution," which was partly in Portuguese, partly in classical Latin, was embellished with a quotation from Hamlet, and concluded with a compliment to me such as I have never received before and am never likely to receive again, for he addressed me as "the Papinian of our age." That I attributed merely to the courteous exaggeration of His Excellency the President. I sat and took part in the proceedings of the Court silently—and listened to judgment being given in an important decision ; after which I rose and took my leave. It was an extraordinarily interesting ceremony, interesting not merely because it was for me a novel experience, but for what it symbolized. It symbolized the great truth that the administration of justice is throughout the whole world the essential safeguard of the State, and that all who engage in this great task

are brothers. So I was proud even for a few short minutes to be privileged to participate in the administration of justice in that great State south of the equator.

So it was everywhere. I attended a meeting of the Brazilian Bar; and there the *bâtonnier* of the Bar paid again a tribute to our country that was very gratifying to British ears. I should like to say that this friendship towards Great Britain is not confined merely to professional circles. On all hands I discovered a friendliness for us and an interest in all our intellectual and other activities to which I venture to think we might do more to respond. (Hear, hear.) There are various ways in which that could be done, and I am happy to say that some of those are being followed up. But to go to a foreign country and find there that the memories of past British statesmen are still cherished was very pleasing. They are actually putting up a statue to Canning at the present moment in Buenos Aires; we have rather forgotten Canning, I think, in this country. I was greeted by the leader of the Brazilian Bar with recollections of Admiral Cochrane, the first admiral of the Brazilian Navy, whose memory is much fresher in Brazil, I may tell you, than it is either in Scotland or in England.

So it was all the time: the friendship which is felt for our country and the desire that more of us should visit their land, and that there should be more coming and going, more interchange of knowledge and of the things of the mind, were everywhere expressed. If my mission accomplished anything, I think it accomplished this: that I was able to assure our South American friends how ready we are in this country to reciprocate.

If I may pass for a moment from the legal matters, I do not think it is out of place in a gathering of this Society, of which I am for the time being Chairman, to refer to a wider subject. The world at the moment is distraught by an intense economic nationalism which is the product of fear and distrust. It is the tendency, naturally, of everyone who is afraid and in a panic to try to draw aside and isolate himself and find security in his own retreat. But, believe me, there is no anchorite's cell for a nation. People in the Middle Ages might, if they pleased, withdraw from society to a nunnery or a monastery and there live their own lives and save their own souls. But there is no hermitage for a nation. No nation can withdraw to a nunnery or a monastery and isolate itself from other countries. Nations have to live together, and I am satisfied that the best method of overcoming the present distrust and want of

confidence, of breaking down those walls and barriers, is to be found, not in a direct economic attack or by direct economic argument, but rather by a lateral approach: by promoting the means of sharing with the peoples of other countries our intellectual interests—our interests in art and literature, and in all those things of the mind which form the best basis for friendship and fellowship. If we devoted ourselves to the development of this kind of intercourse, we should find that many of those economic and many of those political differences which separate us at the present moment would disappear in an atmosphere of friendliness and trust. You cannot quarrel with a person whose tastes in literature, art, and the things of the mind you share, and there is no better foundation than such mutual interest for other and perhaps more material intercourse.

Therefore I feel that it would be a good thing for us in this country to share with the great countries of South America, whose future is so interesting and is bound hereafter to be immensely significant for the world, our heritage in the Old World, and to share it more generously. Nowhere would such a movement have a warmer or kindlier welcome. In the past, London has been the financial clearing-house of the world. All the Republics of South America in their period of development came to London for money, and money was supplied, and their great enterprises of public utility have been to a large extent financed by funds from this country. I ventured to remind them, however, that London has other assets besides money; that London could provide them with much that was of intellectual value in art, history, and literature—for which they might resort to us in the future and which they would find as generously placed at their disposal as in the past we have made available to them our financial resources.

If we were to practise the commerce of ideas as well as the commerce of commodities, we should find that we should be able by that means to eliminate much of the want of confidence and much of the hostility and distrust which at present prevail. Of the commerce of ideas I ventured to say these words in the course of an address, and I think they are true:

The great merit of this intellectual commerce of which I speak is that it is entirely free from all those embarrassments which nowadays beset international trade. There is universal free trade in the things of the mind. No frontiers, no tariff barriers, no quotas, no cartels impede the commerce of ideas. There are no economic problems about it to vex us,

for there can never be over-production just as there can never be under-consumption of knowledge. The exchange is always in favour of both the exporter and the importer, for each gains on the transaction. Here surely is the ideal world of our aspirations !

I explained that I was a commercial traveller, but a commercial traveller in rather unusual goods. In matters of the law in particular I said that we have much to give and much to learn. We have to give of our rich inherited traditions of the common law. We have much to gain in return from the great scientific developments of the code system. My audiences were much interested when I told them that, while many of them were engaged in the study of comparative law, we in the Privy Council practised it, and I certainly surprised them when I said that we had in our library in Downing Street volumes of Spanish law which were referred to in a case from Trinidad not so long ago. They had no idea that so many different systems of law were administered in our Imperial Court. I said : " After all, we are not strangers to the Code. You think that we are only common-law lawyers—with some emphasis on the common—but I can assure you that even the most common lawyer, if he practises or sits in the Privy Council, has to know a great deal about codes. We have to deal with cases from Quebec, where there is a code, and from Mauritius and from other countries which are governed by codes." I was thus able to show them I was not entirely ignorant of their legal methods.

A very striking suggestion was made recently with regard to the law in South America by that distinguished lawyer, Professor Lambert of Lyons, probably one of the most eminent exponents of comparative legislation at this moment. He said :

Comparative jurisprudence has found, since the end of the war, an excellent ground for acclimatization in Latin America . . . where the demand for works devoted to the comparative study of the civil law and the common law is such that one may ask oneself if it is not to be finally by the intermediation of the New World that the junction will be made between the two great bodies of juridical culture which at present divide between them the international community. This impulse of scientific curiosity is particularly apparent in the Argentine Republic, where well-documented monographs on comparative jurisprudence are multiplied in the publications of the great national universities : the *Revista de la Facultad de Derecho y Ciencias Sociales* of Buenos Aires, which reached the end of its sixth volume in December 1927, and the *Anales de la Facultad de Ciencias Juridicas y Sociales* de la Universidad de la Plata, which have just finished their second year of existence.

These studies are being pursued there zealously and strenuously, and it is an interesting and impressive suggestion of Professor Lambert's that ultimately in South America, under new auspices, there may be sown the seeds of that universal system of law which we all aim at achieving.

Among the many things that keep the nations apart, one is certainly the difference in legal terminology and in legal formulas. Why should commerce have this grit thrown into the machine to impede its free working? Happily, by means of conventions, in which my friend, Lord Justice Scott, has taken so large and so useful a part, we are eliminating some of these difficulties, these sources of friction. But a vast amount can be done in that direction by smoothing out the unessential differences and promoting a universal code of commerce which will have the advantage of enabling the transactions of the world to be carried out at least without the complications that arise from conflicting laws. That is the kind of work which the Society of which I have the honour to be Chairman is engaged in assisting, and I am happy to think that my visit to South America has perhaps in a small measure contributed to aid so desirable an object. I think we cannot do too much to advance the study of comparative law, not only for its intrinsic interest, not only because the knowledge of other systems than our own widens our intellectual horizon, but also because the more we learn of other countries and their methods the more we are ready to understand and to appreciate them sympathetically; the more we are able to assist in eliminating those international difficulties which are due to legal differences and so in the end to contribute something to the recovery of world prosperity.

I could have told you many things about the legal constitution of the countries I visited, their practice and their methods; but I will spare you on this convivial occasion. In a more serious mood and at a more fitting time I should be most happy to discuss these topics with my legal friends. To-night I shall conclude as I began by saying how much I have learned from my talks with my legal brethren in South America. Their courtesy, their learning and, may I say, their charm, were all irresistible, and I welcome this opportunity of telling my friends here—for we are a little apt to be insular in this island of ours—how much we have to gain by promoting friendship with our friends of the law in the Argentine, in Uruguay and in Brazil, and, I am sure, with the other Republics of South America. The Ibero-American Institute of Great Britain is

now engaged upon this very work, a great work, a work which is destined, I think, to contribute more than anything else to the restoration of international amity and goodwill.

I thank you for allowing me to occupy your attention for so long, and I am most grateful to you for entertaining my wife and myself with such generous hospitality.

His Excellency the Ambassador of Brazil, SENHOR DON RÉGIS DE OLIVEIRA, G.B.E., said :

It is a great privilege that is given to me to-night to propose the toast of the Society of Comparative Legislation, more especially on this particular occasion when the Society is paying such well-deserved tribute to its Chairman, Lord Macmillan, who recently visited my country.

It was a very great pleasure for all of us in Brazil to receive Lord Macmillan during his recent visit. Although he said his mission was an informal one, I am sure that it was of the greatest importance in reinforcing those friendly relations existing from time immemorial between this country and my own, and I think that no better link can be found to strengthen mutual interests and knowledge between two countries than an exchange of intellectual personalities.

That is the aim of the Ibero-American Institute, which is honoured by having as President your great Ambassador, His Royal Highness the Prince of Wales, and which is under the chairmanship of Mr. Philip Guedalla, who has already achieved such excellent results in the cultivation of closer intellectual relations with our countries. Lord Macmillan, during his tour, was able to come into contact with members of the Government in our country, with every prominent jurist and with the greatest intellectual bodies which he found there. He gave most interesting lectures in the Academy of Letters and elsewhere ; he visited the Institute of Education, the Lyceo de Artes e Officios, the Paulista Society of Anglo-Brazilian Culture and was able to study on the spot the development of Brazilian culture in almost every branch of education. I am very glad that he came, from the legal point of view, in intimate contact with the Supreme Court of Brazil—a body which was delighted with his references to the reception organized for him and which listened with much interest to the address which he delivered on that occasion. He also attended a session in the Hall of Advocates, where he was able to realize how British law and British justice are known to us as well as Britain's secular principles of democratic liberty.

Lord Macmillan, as you all know, irradiates sympathy, and everyone he met in Brazil was immediately captivated by his outstanding personality. In every Brazilian with whom he came in contact he found a friend and an admirer of his knowledge and culture. I know that he liked the country and its natural beauty, and appreciated the level of our intellectual life. No one could have used better than Lord Macmillan that golden key with which he opened the wide door of sympathy and friendship that marked his stay in my country. His visit was the best possible first step for the *rapprochement* of our intellectualities, which cannot be hampered by any barriers, quotas or other impedimenta. And even had there been any insignificant barriers they would have been, I can assure you, already overcome by the presence of Lord Macmillan.

Speaking of the natural beauty of Brazil, the progress of our civilization and the character of our people, which our distinguished visitor was able to appreciate and to study, I want to refer in a few short words to some recent events which have taken place in Brazil so that no doubt can remain in your minds of the true tendencies of our people. My Government informs me that these events have proved that the military and civil communistic elements did not succeed in obtaining any support from the army, which defeated them with the greatest energy ; neither did they find any help from the labour and other social classes. All the civil population witnessed the movement without the slightest sign of approval and, what is more, showed the most evident irritation against these communistic rebels. The communist conspirators have not succeeded in fomenting, either in the capital or the north, any strikes of the working classes to help the rebels. In Rio de Janeiro as well as in Recife all the factories worked with perfect order and normality. The Labour Syndicates, the L.T.U. of the Federal District and of Pernambuco, behaved with the keenest sense of patriotism and, from the beginning, pledged their entire solidarity to the Government in repelling any communist connivance.

On the occasion of this first visit to Brazil, the Ibero-American Institute invited also Sir Richard Redmayne, and no one, I am sure, could have better fulfilled a mission covering so vast a field of mineral wealth than the eminent engineer and scientist who is President of the Institution of Civil Engineers. During his tour Sir Richard was able to meet all the most prominent engineers, and his profound knowledge of everything that touches the mining industry, theoretically and practically, enabled him to acquire, even

in so short a time, a perfect idea not only of the progress we have made in this direction, but also of the immense possibilities which our mineral wealth can offer to the world. I am sure he was very much impressed by the quality and extent of our deposits of iron ore.

My compatriots have had the greatest pleasure in receiving Sir Richard Redmayne and in accompanying him during his visit, and may I say what happy remembrances have been left by his delightful personality with all those with whom he came in contact ?

May I congratulate Lord Macmillan most heartily on the great success of his visit, which has contributed to create, as Lord Macmillan said so well, " a new form of wealth, less material but not less valuable," arising from intercourse in law, art, science, and literature between Great Britain and the South American nations ?

May I express one great regret, and that is not to see the Marquess of Reading, your eminent President, with us this evening ? Lord Reading has honoured me with his friendship for many years, and I know that no one could be better identified with the aims of the Society than that great jurist and statesman, the Marquess of Reading.

Now I think I must come to the toast of the evening which I am proposing, I mean the toast of the Society of Comparative Legislation. I trust I am not expected to speak on comparative legislation, for, although in my University days I studied and even passed my examinations in comparative legislation, those days are, unhappily, too far behind me for me to speak with any authority on the subject, especially when I have before me an audience which, I feel sure, would pass very severe criticism on any such attempt on my part.

I am, however, very pleased indeed to have this opportunity of congratulating the Society on the remarkable work it has done since its foundation in 1894. Since then its aim has been to establish closer contact with different countries and to promote the indispensable knowledge of legislation in different parts of the world.

No object could be more practical or more scientific than that which the Society has been able to achieve for all legislative bodies, practising lawyers, students of sociology and, if I may venture to add, the members of the Diplomatic Service.

We have to thank the Society for the great help which we find in the information it puts at our disposal, especially that which deals with the Statute Law and the forms and methods of legislation in the British Empire and in the United States ; and much praise is due to the Society for its collection of information on subjects which

cover practically every branch of law and touch all the great social, political, and economic problems of our civilization.

All these problems mean different legislation in different countries, and therein lies the work of the Society. No one could fail to appreciate how useful is the existence of an institution whose aim is to study the results of experiments in foreign countries, so often imperfectly known, and to bring them to the notice of those who can profit by them. The result of the establishment of such an intercourse is of the greatest importance, as much lack of understanding through ignorance is avoided and immense opportunities are given to profit by the experience of other countries in the success or failure of various measures adopted by them. Many mistakes can be avoided if precedents derived from the experience of other countries are collected and studied, and I would like to express most emphatically my appreciation of the result you have achieved by following the principles and objects which I have so briefly described.

Every jurist, every lawyer, and every statesman will find much help in the *Review of Legislation*—a most excellent work of reference—as well as in the JOURNAL of the Society, in which may be found articles by prominent lawyers and public men dealing with the working of the law, not only in the British Empire, but in foreign countries as well. I am sure that the foundation of this Society has supplied a long-felt need and is the greatest possible help to all who have at heart the establishment of better relations between the countries of the world.

I want to thank you, my Lord President, for the very kind invitation you have tendered to my wife and myself to be present to-night at this dinner in honour of Lord Macmillan, and for having asked me to propose the Toast of the Society. Will you accept our most sincere congratulations on the excellent work and our best wishes for its continued prosperity?

PROFESSOR H. C. GUTTERIDGE, K.C., said :

In reply to this toast, I have first of all to thank His Excellency and, if I may do so, I would also like to thank Senhora Oliveira, for their kindness in coming here to-night and doing us the honour of being present on this occasion.

Your country, Mr. Ambassador, is one which has always been foremost in the study of comparative law and in the application of the comparative method to legal investigation. The Brazilian code,

which is universally considered to be one of the most outstanding, if not the most outstanding, example of successful codification, was only drawn up after a very careful investigation of the laws of other countries. One thing about the law of your country which has interested me very much is that Brazil is the only non-English-speaking country which possesses the institution of *habeas corpus*. I am told, and I have every reason to believe, that for that reason the individual citizen in Brazil enjoys a much greater freedom from unlawful interference with his liberty than the citizen of almost every other non-English-speaking country.

This dinner is a distinct innovation for this Society. We have not met very often in public—perhaps not as often as we should have met. This occasion, however, is the expression of the feeling which some of us have had that it is about time we came out of our shell and tried to get into touch with the outer world. When I take this table plan in my hand and look at the list of names, I think you will agree with me that we have come out of our shell to great purpose and with great success. When I say that we want to get into touch with the outer world, I do not so much mean the legal public, as the great section of the community which is composed of legislators, administrators and men of business. I think we are able to do work which is of great value to them as well as to lawyers.

The day has gone by, I am glad to say, when it was the fashion to pour ridicule and contempt upon the study of comparative law. I am not going to trot out again the old story about Lord Bowen's opinion of comparative lawyers which is so often produced on these occasions, but there is no doubt that until quite recently the study of comparative law was at a very low ebb in this country. It was also looked upon with some derision abroad. "Junius" did not stand alone when he complained that Lord Mansfield was polluting our noble Saxon laws by introducing into them the law of Scotland and other foreign countries. It may be some comfort to Lord Macmillan to remember that Junius included among these polluting elements the system of Equity, so his strictures may be taken to have been of a somewhat sweeping nature. We find a parallel case on the Continent in the eminent Cardinal who said that Roman law was ruined by being brought across the Channel. But, as he was equally rude with regard to English cookery, the English pronunciation of Latin, and the practice of the Christian religion in England, there is perhaps no need to take him too seriously.

In this country we have at last come to realize that, unless we

pay due attention to certain aspects of foreign law, we shall find ourselves involved in difficulties in our relations with other countries. Much has been said to-night about the similarity of law. I think there is no doubt about that, certainly so far as the law of obligations is concerned ; the law of obligations is very much the same in all countries. But the same rule does not always work in the same way in a different system of law. The legal mentality of the nations is different. A foreign lawyer does not always think along the same lines as an English lawyer, nor does a foreign judge always interpret the wording of a statute in the same way as our judges do. Legal terminology has many traps in it. The same phrase, borrowed very often from Roman law, may mean something different in different countries. Unless we pay great attention to these matters there is liable to be very grave misunderstanding. Sir Henry Maine, as long ago as 1856, called attention to the fact that at that period, nearly one hundred years ago, our negotiations with foreign countries had been perceptibly affected by our failure to be aware of certain peculiarities in the legal terminology and in the mentality of the lawyers of other lands.

There is one instance of this misunderstanding which I think is somewhat in evidence at the present moment. I am glad to see here to-night Lord Luke, President of the British Section of the International Chamber of Commerce, and Mr. Owen Jones, its secretary. We have also Mr. H. M. Cleminson here, of the International Chamber of Shipping. I think they will bear me out in this : that at this time we are experiencing some difficulty owing to the conclusion of a large number of international conventions relating to such matters as commercial and maritime law. Unless great care is exercised when these conventions are drawn up, trouble may be caused, particularly by misunderstanding of terminology. I speak with all due respect in the presence of the Lords of Appeal who are here to-night, but there has been at least one case in the House of Lords where this point was brought forward, namely, the question of the meaning to be attributed to a certain word which signifies one thing in French and another in English. Unless we are very careful, it is assumed that the two meanings are the same.

Men of business are fully alive to this danger. The British Section of the International Chamber of Commerce, at all events, has been very busy in collecting information as to the commercial laws of the different countries. It has also been at great pains to endeavour to standardize trade terms. I am glad to say that we in

the Society of Comparative Legislation have always done our best to collaborate with the Chambers of Commerce, and I can only assure Lord Luke and Mr. Owen Jones that, whenever it is in our power to give any assistance to them, we shall be only too glad to do anything we can. Our resources are somewhat limited ; I do not want to make an appeal, but our finances have not been too flourishing lately, and this fact has somewhat clipped our wings. But we are doing our best, and if we can help in any way we shall always be ready to do so.

One useful piece of work that we have been able to do is to establish a convenient link between the lawyers of this country and the lawyers of the Continent of Europe. We have, perhaps, done more in this Society than has been done by any other body in England to bring that about, and it is a result with which we can be satisfied.

There is one other task which we have set before us, and it is this : namely, to spread the knowledge of English law on the Continent. Personally, I attach great importance to this work. The tendency in some European countries at present is very favourable to the reception of certain doctrines of English law. The conditions are probably more favourable now than they are ever likely to be again, and it is very necessary that as much missionary work should be done by us as possible. It is not easy work. I remember one occasion last year when I had to try to explain to a foreign lawyer that somewhat mysterious institution which will disappear after the 1st of January, 1936, namely, the restraint on anticipation on the property of a married woman. The foreign lawyer looked at me and said, " Ah, c'est drôle. Votre droit ressemble à votre orthographe. C'est tout à fait original." There is no doubt that our law is original in some ways. But the reference to that remark reminds me of the distinguished foreigner who came over to England to learn our language. He was very successful, as he thought ; he learned to distinguish the different pronunciation of the words " plough," " dough," " cough " and " enough." He thought he could go back to his country with a good conscience. But a terrible shock awaited him when he arrived at Dover station, for he saw a poster on which were the following words : " Cavalcade : Pronounced Success ! "

May I conclude, my Lord Chairman, by making a reference to some remarks that were made on the last occasion when the Society met in public ? I do this deliberately, because it is many years ago

—something like thirty years ago, and it has a distinct bearing on what has been said to-night. These words were used by Sir Courtney Ilbert, who was one of the founders of this Society :

We have all much to learn from each other, from our experiments, from our failures, from our successes. That is one lesson to be derived from a survey of the legislation of other countries. But there is another. The more we know about each other, the more especially if we direct our attention to those aims and objects which unite instead of dividing mankind, the less likely are we to be influenced by those suspicions and prejudices bred of ignorance which are the most fertile sources of discord and of war. The knowledge which it is the object of this Society to provide and to organize makes for progress and for peace. It is in the supply of and organization of that knowledge that we ask you to help.

I thank you again, your Excellency and Senhora de Oliveira, for the compliment you have paid us in attending our dinner.

LORD ASKWITH, K.C., in proposing the health of the Chairman, said :

I have known Lord Atkin for more than a generation. He took over from me certain premises in a place called Pump Court, and he always paid his rent and never asked for many repairs if the place wanted them, so I had no quarrel with him legally. Nor, since he has become a judge, have I yet been arraigned before him. He has had a remarkable career, and I can assure you that he is a good fellow. But he is more than a good fellow, he is a man who can lead men, and can act as a conciliator and as an arbitrator among great masses of men and women. Years ago a question came up over a difficult arbitration, on the Midland Railway, I think, and Mr. Lloyd George, who was then President of the Board of Trade, asked, " Who is this Mr. Atkin who is suggested as an arbitrator ? " Being a person of resource on occasion, I remarked that Mr. Atkin had been partially brought up in Wales and that his domicile was then, as I think it is now, more or less in Wales. That was good enough ; Mr. Atkin must be versatile—and versatile he has proved to be. The amount of work that he has done since has been extraordinary. I know what he did in arbitration during the War, and I know of cases where he has been called in, scarcely in a judicial capacity, but more for the object of conciliation.

He has been Chairman of committee after committee ; inquiring *inter alia* into such things as crime, idiocy, and the position of women in commerce and industry—matters alien to each other or cognate, according to fancy. He then went further afield, and

became Vice-Chairman of this Society for three years, following up that service with four years as Chairman. He then became Chairman of a committee on legal education and he has advocated an Institute of Legal Research ; a great point, but I think one too much for the Government.

I am not quite sure that Governments are not afraid of us lawyers. A lawyer who can write, and speak, too, on the influence of Grotius upon Scots law is a dangerous person. So they popped Lord Atkin into the House of Lords, and there he has continued his versatility. I can assure you that, when Lord Atkin murmurs out a few sentences, their Lordships strain their ears to hear him, and if they have enough knowledge to understand what the meaning is, they are very apt to follow his advice. He therefore has a continuing influence, and I do not know where it will end—except that the end this evening will be that we shall all drink his health.

LORD ATKIN, in reply, thanked Lord Askwith, and remarked that it was always satisfactory to find a landlord speaking well of his tenant. Lord Askwith naturally dwelt on opportunities of conciliation, for he had himself been a great conciliator for many years, and many people did not realize the wonderful services which he had rendered for years as a conciliator in industrial disputes. The Chairman expressed regret at the absence of the Society's President, Lord Reading, and assured the guests that nothing would have kept him from the dinner if he had not been forbidden by his doctors to attend any function of the kind.

THE SOUTH AUSTRALIAN CENTENARY OF LEGISLATION

[Contributed by THE HONOURABLE MR. JUSTICE ANGAS PARSONS, *the Acting Chief Justice of South Australia*; and PROFESSOR A. L. CAMPBELL, M.B.E., B.A., B.E., *Bonython Professor of Law in the University of Adelaide, South Australia.*]

IN 1936 South Australia celebrates the centenary, not of its first settlement or discovery, but of its formal and legal establishment as a separate Australian province; and on this occasion it may boast of its unique position in Australian history, in that on December 28, 1836, when it came into existence as a province its Constitution was on a basis political and commercial, rather than military and penal, as was that of the other Australian colonies already established.

At that date part of the territory now included in the State of South Australia was legally incorporated in New South Wales, as in 1787 New South Wales covered the eastern part of Australia as far west as longitude 135° E. In 1825 this was extended to 129° E. The boundaries on north and south were the sea.

The southern boundary of this territory, namely the coast, had been sighted much earlier by the Dutch, but the forbidding nature of the shore, and the arid character of the land which they could see, did not attract them, nor was this territory much exploited by the Government of New South Wales. It was left to Matthew Flinders in 1802 to make a closer scrutiny when he discovered Port Lincoln and Kangaroo Island. Of the former he reports, "Despite the excellent harbour the soil was rocky and barren, and the supply of fresh water insufficient." He was far more favourably impressed by Kangaroo Island, where the soil was "much superior to any before seen either upon the south coast of the continent, or upon the islands near it," and better than some of the land cultivated in Port Jackson. It is curious to note in passing that the reports, prepared about the same time, of the French—Baudin and Flinders met in Encounter Bay in 1802—exactly reverse the relative merits of these two sites.

From time to time reports came from various sources with accounts of the land and its features, but little attention was paid them, and

no attempt was made by New South Wales to set up any formal establishment in this area ; even Sturt's discovery of the lower reaches of the Murray did not distract the attention which was concentrated closer to Port Jackson. Thus at this stage, while the territory was under the government of New South Wales, it was practically unsettled, and in effect the New South Wales law had no real application.

The conception of South Australia's separate political existence begins in 1829, in Edward Gibbon Wakefield's " Letter from Sydney." Wakefield, while paying the penalty for abducting on a runaway marriage the daughter of wealthy parents, had ample opportunity of studying the convict system, and in the course of this " Letter " made a violent attack on the system in force in New South Wales. The land grants, and the ensuing cheapness of land, had led to the depletion of labourers and economic waste. To counteract this he suggested that it would be better to keep the land at a " sufficient price," and to utilize the money derived from the disposal of the land to bring out suitable immigrants who would be labourers for the landowners, but would need to work and save before acquiring land themselves. In time there would be constituted a community capable of managing its own affairs, instead of leaving them to the Colonial Office.

Wakefield was able to interest sufficient capital to form the South Australian Association to test the scheme. The constitution when worked out in detail proposed not only that a private company should be in control of the land and labour portions of the scheme, but also that it should govern the country on the lines of the chartered companies of the previous century. The Colonial Office did not take kindly to the scheme, but the South Australian Association, by a modification of these proposals, was able to secure the favour of the Colonial Office, mainly by abandoning the part which was to vest the government in the company, and by giving a guarantee—thought at the time to be substantial, but subsequently declared to be " obviously inadequate " ¹—to the amount of £20,000, to ensure that the new Colony should not be a burden on the Home authorities. Accordingly, in 1834, by 4 & 5 Wm. IV, c. 95, the new province was established within the territory of New South Wales, with its eastern boundary at longitude 141° E.

The settlement of South Australia was delayed by reason of the difficulty of finding purchasers for land and persons willing to emigrate and settle in a country about which practically nothing was known. It

¹ *Report of Select Committee of House of Commons on South Australia*, 1841, p. v.

is possible that the whole scheme might have collapsed had not George Fife Angas promoted the South Australian Company, which agreed to purchase land and fitted out ships to transport the new settlers.¹

Boundaries.—By letters patent dated February 18, 1836, and issued under the 1834 Act, the boundaries of the new province were fixed on the north at latitude 26° S., on the south at the Southern Ocean, on the west at longitude 132° E. and on the east at longitude 141° E. On December 28, 1836, the province was duly proclaimed within these boundaries by Governor Hindmarsh on his landing.

In 1861 the western boundary was extended to 129° E., thus including the strip of territory lying between South Australia and Western Australia, and giving these two colonies a common boundary.

In 1863 the Government of South Australia, influenced by favourable reports, asked to have added to it the territory to the north of latitude 26° S., not included in the Colony of Queensland, which had been established as a separate colony in 1859. This was granted, and the Northern Territory became subject to South Australia, and continued to be controlled as part of its territory, but with separate accounts and treated as a separate unit until passed over to the Commonwealth of Australia by the Northern Territory Acceptance Act, No. 20 of 1910. Under this Act the laws in force (which were mainly South Australian) were continued, but thereafter were to be altered or repealed only by or under the Commonwealth. The severance of the Northern Territory left South Australia with its present boundaries.

Although the boundaries were thus accurately defined, the ascertainment of them led to some difficulty, as, owing to the comparatively unreliable observations, it was found that the surveyors in marking out the dividing line between South Australia and New South Wales had placed the boundary a little over two miles too far west. This led to litigation between South Australia and Victoria in 1911, when the High Court of Australia, subsequently confirmed by the Privy Council, decided that the true boundaries should be taken as on the line so laid out, and not on the strict meridian.²

¹ A careful examination of the facts in connexion with the foundation of South Australia has been made by A. Grenfell Price, C.M.G., D.Litt., M.A. (Oxon.), F.R.G.S., in his *Founders and Pioneers of South Australia*, and he concludes that "South Australia owes George Fife Angas" (great-grandfather of Mr. Justice Angas Parsons) "a deep debt of gratitude for his work in connection with the foundation of the colony, and that his career marks him as one of the most important founders and pioneers of South Australia and as a really good and great man." Angas was offered, but declined, a baronetcy for his work in saving New Zealand for the Empire, when the French were about to annex it (pp. 86, 90, 91).—(Ed.)

² *State of South Australia v. State of Victoria*, 12 C.L.R. 667, [1914] A.C. 283.

Constitution.—The original Act of 1834, after reciting that “Divers of His Majesty’s subjects, possessing amongst them considerable property, are desirous to embark for this part of Australia ; and it is highly expedient that they should be enabled to carry their said laudable purpose into effect,” provides for the erection by His Majesty with the advice of the Privy Council of one or more provinces within the boundaries mentioned above, and then provides “that all and every person who shall at any time hereafter inhabit or reside within His Majesty’s said province or provinces shall be free, and shall not be subject to or bound by any laws, orders, statutes, and constitutions which have been heretofore made, or which hereafter shall be made, ordered, or enacted, by, for, or as the laws, orders, statutes, or constitutions of any other part of Australia.” (One province was erected by letters patent on February 19, 1836, taking in the whole area.) Power was reserved to the King in Council to appoint a person or persons resident in South Australia to make laws not repugnant to this Act, such laws to be laid before the King in Council. Local government was contemplated when the population reached 50,000, but the system of sales of waste land was not to be changed, except by the authority of His Majesty and Parliament.

The colony was thus established on the Wakefield system, and a further feature of this Act, so far as the other Australian colonies are concerned, is that no convicts were to be transported to the new province, but by Act No. 14 of 1842 South Australia adopted several English criminal statutes, including 1 Vict. c. 90, allowing South Australia to transport her own convicts. This Act was repealed in 1851,¹ and penal servitude substituted for transportation. When this Act was repealed by a later Constitution Act,² this provision was re-enacted. The purpose of the last-mentioned Act was to meet the financial difficulties which had occurred and also the difficulties of administration due to the fact that there was divided authority between the Commissioners responsible for the land part of the scheme, on the one hand, and the authorities responsible for the government, on the other. By this Act the province was reconstituted on the basis of a Crown Colony, with a Legislative Council consisting of the Governor, three public servants and four others to be nominated from the independent colonists, all to be appointed by the Governor ; this still left the Governor in control by means of his casting vote. The right of the colonists to control their own affairs, which was always one of the objectives of

¹ 18 of 1851 ; 3 of 1854.

5 & 6 Vict. c. 61.

the Wakefield scheme, was advanced another step by the Australian Colonies Government Act, 1850,¹ which empowered the existing Legislative Council to make provision for the constitution and election of a larger Legislative Council, not exceeding twenty-four in number, one third to be nominated by the Governor, and the remainder to be elected by the inhabitants on a property franchise. The Act also gave the Legislative Council wide power of amending the Constitution, and in particular envisaged a fully representative bicameral system to replace this partially representative body. In the opening speech to the new Council the Lieutenant-Governor² suggested that it would be wise to give the new legislature a fair trial before availing itself of the wider constitutional powers conferred by the Act, but the Council in reply declared that the time had arrived when the Colony "should be entrusted with complete independence in all matters not affecting Imperial interests." A Select Committee was appointed to examine the constitutional position, but it did not arrive at any satisfactory conclusion. Thereupon the Governor in consultation with the Executive Council, and the nominated members of the Legislative Council, prepared a draft constitution. This Bill was passed in 1853, but was vetoed, after being reserved, as it appeared to limit the Crown prerogative, particularly with regard to the disallowance of Bills assented to locally, and also dealt with the Governor's right to assent to or reserve local Bills. In 1855 a new Bill was passed omitting the objectionable feature, and was finally accepted in 1856 as the Constitution Act, No. 2 of 1855-6. This Act was the principal Constitution Act until 1934, when a Consolidating Act was passed (No. 2151 of 1934) without making any material changes. The Upper House was, and is, continued as a purely elective chamber, the franchise being limited to persons entitled to certain freehold or leasehold estates, occupiers of dwelling-houses as owner or tenant, and returned soldiers. Members must be thirty years of age, British subjects, and resident in the State three years. The Lower House, the House of Assembly, is

¹ 13 & 14 Vict. c. 59.

² In the above Bill as originally introduced there were clauses contemplating uniform tariffs for Australia, and the first steps towards Federation. The clauses were dropped, but Earl Grey, the sponsor of the Bill, by executive act appointed the Governor of New South Wales as Governor-General, who was to superintend measures for the common welfare, without interfering with matters affecting only the internal administration of the colonies. The Governors of these colonies were appointed Lieutenant-Governors accordingly. The scheme proved abortive, and the title of Governor-General was dropped in 1861 (Quick and Garran, *Constn. of Australian Commonwealth*, pp. 89-90; Jenks, *History of Australasian Colonies*, pp. 164-5).

naturally the more democratic House, being elected on the basis of ordinary adult suffrage since 1855. South Australia was the first of the Colonies, in 1894, to introduce woman franchise.

The 1855 Act marked the introduction of responsible government in South Australia. The Electoral Act No. 10 of 1855-6, passed in the first year of the Parliament established by the Constitution, anticipates the Ballot Act, 1872,¹ and it is believed the legislation in all the other colonies, except Victoria, where the legislation was a few weeks earlier, by providing (in s. 29) for a system of secret voting, by which the elector is furnished with a voting paper and is required to retire into a compartment where "alone and in private, without interruption," he shall obliterate the names of those for whom he does not intend to vote, and to fold the paper, which the Returning Officer is required to place in the box without opening.

One feature of the Constitution Acts calls for comment. The 1855-6 Act provided for triennial Parliaments, but by the Constitution (Quinquennial Parliament) Act No. 2141 of 1933, reserved and assented to in 1934, the existing House of Assembly was continued in office for five years.

Finally the provision for overcoming deadlocks may be noted. When a Bill has been passed by the House of Assembly during any Session of Parliament, and a substantially similar Bill has been passed by it during the next ensuing Parliament by an absolute majority after a general election for the House has taken place between the two Parliaments, and both Bills have been rejected by the Legislative Council, "it shall be lawful for, but not obligatory upon, the Governor within six months after the last election," either to dissolve both Houses or to issue writs for the election of two additional members for each Council District. There seems to be nothing in this provision to ensure the overcoming of the deadlock, but the moderation of the members has so far enabled differences to be adjusted by conferences between managers from the two Houses. This provision regarding deadlocks was introduced in 1901, and was repeated in the Consolidating Act.²

Law in South Australia at the Date of Settlement.—The principles governing the application of Imperial law to a newly settled colony have been fully discussed in a previous article in this *Journal*,³ and no useful purpose could be served by covering that ground further. It seems that New South Wales law may be completely

¹ 35 & 36 Vict. c. 33.

² No. 779 of 1901, s. 24; No. 2151 of 1933, s. 41.

³ "Century of Victorian Law," by the late Sir Harrison Moore, *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. iv, pp. 175 ff.

ignored as part of the South Australian law, and the present position is that South Australia is to be treated as a colony newly settled as at December 28, 1836, and, in general, the ordinary tests are to be applied to determine what Imperial law, whether Common Law or Statute, applies in South Australia. The Supreme Court of South Australia has refused to give a strict application of the rules of English Law, when applied to different circumstances ; e.g. *Critten-den v. Smith* (Cooper J.—right to divert watercourses—" Register," June 20, 1855, and *Hill v. Kingsmill* (Cooper and Boothby JJ.—whether gum trees are timber—" Register," December 4, 1855.)¹

In reviewing the development of law over a period of one hundred years, it is necessary to make some arbitrary selection, and for this purpose our choice has been guided by two features—the importance and the novelty of the legislation. Although the subject of this article is South Australian law, it is perhaps permissible to refer to the Colonial Laws Validity Act of 1865,² as this Act owed its birth to a peculiar set of circumstances arising in South Australia.

Colonial Laws Validity Act.—This great charter of colonial constitutional liberty was passed primarily to remove doubts created by the Hon. Mr. Justice Boothby, a member of the Supreme Court of South Australia. Whatever his motives, Mr. Justice Boothby brought himself prominently before the public eye on account of his obstructive tactics directed against his brother judges and the legislature. In particular, he questioned the power of the local legislature to pass the Real Property Act,³ on the ground that it deprived Her Majesty of her prerogative of deciding appeals against the " validity of title by the Judicial Committee of Her Majesty's Privy Council, if such title be indeed bad and insufficient by the laws of England," as the " effect of the Act was to erect a tribunal which will have jurisdiction to set aside the right of appeal to Her Majesty ; for that is the effect of an indefeasible title."⁴ In other cases he questioned the right of the Governor to assent to certain Bills, and the validity of those Bills when assented to ; also the power of a local legislature to establish courts of justice, to appoint judges or an Attorney-General.⁵ Incidentally, he denied the validity of the appointment of the Chief Justice, and claimed that he was the only judge correctly appointed, as he held the Queen's commission, and

¹ But see contra, *Chapman v. Strawbridge*, (1910) S.A.L.R. 118, 129.

² 28 & 29 Vict. c. 63.

³ *v. infra*.

⁴ Correspondence between Govt. of S.A. and Secretary of State, re Boothby J. (H.M. Stationery Office, 1862, pp. 2 and 9.)

⁵ *Loc. cit.*, p. 4.

on at least one occasion,¹ after the other members of the Court, including the Chief Justice, had formally adjourned the Court, he insisted upon his right to continue sitting as the Full Court.² Some of his objections on the grounds of informality to some of the Electoral Acts were sound, but so obstructive did he become that it was necessary to obtain a ruling from the Imperial law officers. The opinion of Sir Roundell Palmer and Sir William Atherton is too well known to need recapitulation, but as a result of this incident, and that opinion, this epoch-making Act was passed to apply to the whole of the Dominions.

Real Property Acts.—Probably the greatest contribution of South Australia to the legal systems of the world is the system of registration of title to land introduced by Sir Robert Torrens in a Bill which became law in South Australia as the Real Property Act, No. 15 of 1857-8. The object of the Bill was to simplify dealings in land and to secure indefeasibility of title on proper registration of any instrument of title under the Act. Shortly stated, the Register of Title is to be conclusive, and it therefore becomes unnecessary to examine earlier dealings with land—an examination which would involve “losses,” heavy costs, and much perplexity by reason that the laws relating to transfer and encumbrance of freehold and other interests in land are complex, cumbrous and unsuited to the requirements of the inhabitants. The Bill set out to abolish the necessity of retrospective investigations, and proposed that on each transfer of the fee simple the existing title should be surrendered to the Crown, and a fresh grant from the Crown be issued to the transferee, and that registration *per se* and alone should give validity to transactions affecting land. The Bill, besides meeting with the disapproval of Mr. Justice Boothby,³ was strenuously opposed by many of the leading lawyers, but finally carried. It was re-enacted with certain amendments in 1860, and after various amendments was consolidated in 1886. Besides simplifying procedure, and providing for indefeasibility of title, the Act made provision for an assurance fund to compensate owners who had been deprived of title by mistakes in registration.

This Act has been copied substantially in all the States of the Commonwealth, and, according to one writer, a system of Lands Titles Registration modelled in some respects on the Torrens System is in force in not less than thirty-one jurisdictions or governmental

¹ S. A. Parly. Papers No. 22 of 1867, p. clxiv.

² (1867) S.A.L.R. 11.

³ *v. supra.*

units of the British Empire, including parts of Canada, West Indies, East Africa, and also in several of the United States.

In this connexion it is interesting to notice an earlier attempt to simplify the language and machinery of conveyancing, especially in relation to ordinary covenants usually contained in conveyances, mortgages, and assignments of leases. By Act No. 15 of 6 & 7 Vict. (1843), the English Conveyancing Act (1881) was anticipated by doing away with the necessity of setting out *in extenso* the usual covenants.¹

But even before this Act the value of the publicity of the Register was realized, and by Act 5 Victoria, No. 8, provision was made for setting up an office for the registration of "Deeds, Wills, Judgments, Conveyances, and other Instruments—to prevent secret and fraudulent conveyances, and to provide means whereby the title to real property may be more certainly known." By this Act "all deeds, conveyances or contracts in writing other than leases not exceeding three years, and all wills and devises in writing, and of (*sic*) all judgments, other than judgments or recognizances entered into in the name and in the proper account of Her Majesty, etc., concerning lands, tenements or hereditaments, or whereby the same be in any ways affected in law and equity may be registered . . . and every such deed, conveyance, etc., shall be adjudged fraudulent and void at law and at equity against any subsequent purchaser or mortgagee or party for value or consideration," unless a memorial thereof be registered prior to the registration of the former instrument.

The Ancient Lights Act, 1911, declared that no right to light should be capable of coming into existence by reason only of the enjoyment for any period of time or presumption of a lost grant based upon such enjoyment. Rights actually acquired were, however, excepted.

¹ Although it is suggested above that the Torrens System was the first real effective system for registering title, and thereby simplifying the ordinary steps of investigation of title, conveyancing, etc., as early as Henry VIII the basic principles of the scheme had already been recognized and an attempt made to introduce a corresponding system. Speaking of that attempt one may be pardoned for quoting Professor Sir William Holdsworth's views: "This is a remarkably comprehensive scheme for the registration of conveyances; and, if it had been passed and efficiently carried out, we should have to-day in working order a series of County Registers which would have considerably simplified the land law. We should not have been faced with the difficulty of fitting a scheme of registration on to a system which the large powers of landowners and the ingenuity of conveyancers have made more complex than any other modern system. Such a scheme would have been easy to apply to a comparatively youthful legal system, and in a country which was as yet by no means densely populated" (Holdsworth's *History of English Law*, vol. iv, p. 459). The last few words show how the framers of the Torrens scheme realized the opportunity which presented itself to them, and took advantage of it.

Finally, with regard to real property the succession to an intestate's real estate was abolished by Act No. 29 of 1867, which gave the administrator the same rights and imposed on him the same obligations with regard to the real estate as previously existed in respect of "chattel, real property, and other personal assets" (s. 1). Thus primogeniture was abolished.

Industrial Legislation.—The Australian System of Courts of Conciliation and Arbitration for the settlement or prevention of industrial disputes is one of the outstanding features of modern social experiment. Actually the conception of a special industrial court, with power to conciliate and make an arbitral award enforceable on the parties, seems to be due to a prominent leader in South Australian politics—the Right Hon. C. C. Kingston. As a result of industrial trouble in 1890, and more particularly the Shearers' and Maritime Strikes, Kingston proposed to adopt in part the arbitration system already in use in civil matters by parties who submitted a dispute between them to arbitration. Kingston's idea was that the parties to an industrial dispute might similarly be induced to submit their disputes to "tribunals in which employers and employees had confidence, and which shall be charged with the duty of preventing disputes or settling them when they arise." Such a tribunal might also prevent disputes coming to a head by a process of conciliation. In 1890 Kingston drafted a Bill providing for the appointment of a Minister of Industry and an Industrial Registrar and for the setting up of a Board or Boards, with powers of compulsory conciliation and arbitration, where the parties consented. Awards made on such arbitration were to be enforceable, but no provision was contemplated for a common rule. Unions might register under the Act, and in this connexion Kingston proposed to assimilate them as far as possible to companies under the Companies Act. This Bill was the forerunner of the Australian system, but was not passed till 1894. Since then an elaborate Industrial Code has been provided for the regulation of the relation between employers and employees, but the State law has been overshadowed by the legislation of the Commonwealth. Those who write in a hundred years from now may be able to see the results of this experiment in its true proportions.

Claims against the Crown.—In accordance with the democratic principle which influenced a good deal of the legislation immediately after the introduction of responsible government, it was decided to limit the Crown's prerogative defence against claims by the subject.

In 1853 by the Claimants' Relief Act it was provided that "in all cases of dispute or difference touching any pecuniary claim between any subject of Her Majesty and the Colonial Government of the Province of South Australia . . . it shall be lawful for any person having such dispute to present a petition to the Lieutenant-Governor for the time being setting forth the particulars of the claim of such petitioner." Such petition after being certified by a practising barrister is referred to the court for trial in the ordinary way. These words may suggest at first sight that the petition is permissible only in cases of debt or *indebitatus assumpsit*, but it was held by the South Australian Court in *Bloch v. Smith*,¹ subsequently confirmed by the Privy Council,² that the words were appropriate to cover claims or damages in tort. This extends the remedy of the subject in South Australia beyond that available in England, at least until recently, and in other States ; but it will be seen that the Act is limited to "pecuniary claims." It is therefore possible that *qua* South Australian legislation some disabilities may still exist, and they will attach to South Australian residents who are naturally under the jurisdiction of the South Australian legislature. If so, this leads to a curious anomaly in that residents of other States may have a wider remedy against the State than one of its own residents. This follows from a decision of the High Court in *Commonwealth v. State of New South Wales*³ on the interpretation of s. 75 (IV), whereby jurisdiction is given to the High Court "in all matters between a State and a resident of another State."

The Judiciary Act, 1903-27, s. 58, has made competent, either in the Supreme Court of the State or in the High Court, "any claim against a State whether in contract or in tort in respect of a matter in which the High Court has original jurisdiction." The above decision has held that this is a matter of substantive law, not of adjective law, and therefore claims are justiciable whether the State has foregone its prerogative right or not.

Judicial System.—A Supreme Court was established by a local statute, 7 Wm. IV, c. 5. By this and subsequent Acts the ordinary Common Law and Equity jurisdictions were conferred, and the separation between Common Law and Equity was observed until 1879. The Supreme Court Act, No. 116 of 1878, which took effect in 1879, applied the Judicature System to South Australia, fused the

¹ (1922) S.A.L.R. 95.

² *Sub. nom. Welden v. Smith*, [1924] A.C. 484, reversing High Court of Australia 30 C.L.R. 585.

³ 32 C.L.R. 200.

Common Law and Equity jurisdictions and adopted the English Judicature System, with the exception that instead of the Court of Appeal, a full court consisting of generally three Supreme Court judges is constituted to hear appeals. Below the Supreme Court on the civil side, local courts with jurisdictions defined by the amounts in issue have been constituted on lines similar to the English county courts.

On the Criminal side all trials on informations by the Attorney-General must be taken before a criminal court presided over by a Supreme Court judge; the Grand Jury had been abolished by Act No. 10 of 1852. The magistrates and justices of the peace have jurisdiction to deal summarily with simple and minor indictable offences, and in certain cases may impose penalty up to two years' imprisonment or a fine of £100. A change recently introduced in regard to those offences, which in some other States may be alternatively tried summarily or sent on to a criminal court of sessions for trial before a jury, was introduced in 1931, whereby instead of leaving the option to the defendant to decide whether he will demand trial by jury, the decision is left to the magistrate.¹

To return to the Civil side, two matters seem to call for comment. In the first place a Court of Appeals was established by the Supreme Court Ordinance, No. 5 of 7 Wm. IV, s. 16.² This court is curious, not in its *institution* (similar courts were common in the West Indian and American colonies),³ but in its *survival*. It was created by the Supreme Court Act, 7 Wm. IV, No. 5, s. 16, and originally consisted of the Governor and Council of the Province, with the exception of the Advocate-General and Crown Solicitor. At that time the judge of the Supreme Court was a member of the Council. It had jurisdiction to entertain appeals from the Supreme Court in cases where the sum or matter in issue amounted to £100. Subsequent changes in the constitution of the Colony—first to representative, and next to responsible government—led on each occasion to changes in the constitution of the Council, and to doubts whether the Court of Appeals had survived. It was continued in existence by the Supreme Court Act, No. 31 of 1855-6; but in 1860 the judges of the Supreme Court unanimously declared that the Court of Appeals had ceased to exist upon responsible government being introduced into the Colony. An Act was passed, No. 5 of 1861,

¹ Act No. 2051 of 1931, s. 27.

² See also Consolidating Act No. 31 of 1855-6, s. 18.

³ v. Clark's *Colonial Law*, p. 33.

to affirm the existence of the court ; and in 1865, as a temporary expedient to provide a means of over-ruling a judgment of the Supreme Court that the colonial legislature had no power to constitute courts, the Court of Appeals was given jurisdiction on appeal from judgments or orders of the Supreme Court without reference to the amount in dispute.¹ Since the judges had held that Parliament had no power to create courts, they could not, if they were consistent, have recognized the legality of this Act ; but the Colonial Laws Validity Act fortunately arrived and prevented any conflict. A Bill to abolish the court was introduced into Parliament in 1868, but rejected by a large majority. It soon fell into desuetude. It has not sat for over fifty years, but it still remains in existence, and some dissatisfied litigant may yet set its rusty machinery in motion again.

The other matter is in regard to the desire to facilitate and cheapen litigation. By the Local Courts Act, No. 1782 of 1926, the Local Court of Adelaide in its full jurisdiction has had conferred on it a special equitable jurisdiction covering claims by creditors, legatees, devisees or next of kin, and claims for execution of trusts, foreclosure or redemption, or for enforcing charges or liens, for the dissolution of partnerships, relief against fraud or mistake, partition of land, where the amount in issue does not exceed £500, also for specific performance, or cancellation of an agreement for sale or lease of property to the value of £2,000 ; the court also may grant orders in the nature of injunctions where these are requisite for granting relief in any matter within the jurisdiction of the court (s. 259), but power is reserved to a Supreme Court judge to order the transfer of such actions to the Supreme Court.

Litigation.—It would be more satisfactory if civil cases could be disposed of more speedily. Congestion of business in the local courts is the principal cause of, perhaps, six months elapsing from issue of process to judgment. The rules of the Supreme Court provide for the disposal of causes on a summons for immediate relief, but this method is only practicable where the issues of fact are determinable summarily. By the rules provision is made for the determination of commercial causes as in England, but too little use is made of this machinery, though it has been available since 1913. Probably litigants and their advisers have preferred the familiar though longer highway to short cuts of which they have had no practical experience. On the Criminal side as a rule, an offender will have the charge determined by a jury during the month

¹ Act No. 15 of 1865.

following his committal for trial. In the case of an appeal against a conviction to the Court of Criminal Appeal—there was only one in 1934—the result will be reached within about a month from the date of the appeal being instituted. Appeals from that court to the High Court are very rare—in 1934 there were none.

Juries.—South Australia appears to be the only Australian Colony into which on its foundation the full right of trial by jury, as known to English law, was introduced. For obvious reasons such right was not practicable in the convict settlements. In adopting the Judicature System in 1878, the Supreme Court followed the practice of the English court, allowing for trial by jury in various cases, but elaborate changes have now been made by the Juries Act, No. 1805 of 1927. Under this Act, civil juries are abolished, unless it appears to the court or a judge that a question may arise whether any party has been guilty of an indictable offence, in which case the judge on the application of any party may make the necessary order for a jury (s. 5). By the same section special juries are abolished.

Provision is also made for majority verdicts in both civil and criminal cases. In any case, except those involving capital offences, the hearing may be continued, provided the judge approves, with a jury reduced by the withdrawal by death or illness of any juror during the course of the trial, provided that the number is not reduced below five-sixths of the original number. Majority verdicts will be accepted in civil cases after three hours, if three-quarters agree, and in criminal cases after four hours, if five-sixths agree. The most radical change, designed to meet the case of conscientious objectors or "jury squaring," is that except in capital cases a majority verdict of ten jurors after four hours' retirement is to be accepted (s. 57).

Evidence.—The course of the Evidence Acts has largely followed that of English Acts; but in view of the number of aboriginal natives resident in South Australia, many of whom are uncivilized, it has been found necessary to make provision for the acceptance of their unsworn testimony after the judge has explained the duty of that person to tell the truth.

The vexed question of compellability of an accused person's wife or husband as a witness has been elaborately dealt with, so as to make her competent and compellable in civil cases, and in certain criminal cases involving various sexual offences, endangering lives of children by exposure or neglect, assault, and so on. But already, in 1882, by the Accused Persons Evidence Act, accused persons and

their respective spouses had been made competent witnesses for the defence, with the proviso that no presumption of guilt should be made from the fact of such person electing not to give evidence.

The Profession.—In the early stages members were admitted to practice both as barristers and solicitors. In 1841, at a meeting of twenty-one members of the legal profession then practising in Adelaide, it was resolved by a majority of 16 to 3 (2 not voting) that it was expedient that the profession should be divided. The Governor and the judge objected, possibly because of the lack of English barristers—up to 1846 there had only been two—Cooper J. and Henry Jickling, who had been an acting judge. However, the Acts contemplated that at some stage separation might be justified, and made provision accordingly, and in 1927 the judges of the Supreme Court recommended, in the interests of justice, that a separation should be made. The matter was referred to the Law Society, and a plebiscite of the members taken; the majority were averse to any change—accordingly the two branches are still amalgamated.

Status of Women.—The early introduction of the women's franchise has already been referred to, and South Australia has been in the forefront in removing any legal incapacity or disqualification due to sex; thus by Act No. 172 of 1880, women were qualified to be admitted to University degrees; by Act No. 1050 of 1911 to practise law; by Act No. 1183 of 1914 (s. 8) to become municipal councillors, and by Act No. 1456 of 1921 to be justices of the peace and public notaries.

South Australia was also a pioneer in legislation touching prohibited degrees of relationship in the matter of marriage. In 1858 South Australia had passed a Bill legalizing marriage with a deceased wife's sister, but the Bill was disallowed. Similar Bills in 1860, 1863 and 1870 were also refused the Royal Assent, but in 1871 the Imperial Government gave way, and such marriages were then legalized.¹ Similarly, by 1672 of 1925, marriage of a woman with her deceased husband's brother was also legalized.

Married Women's Property.—In this matter South Australia fell into line with the legislation of the United Kingdom, for the most part adopting *verbatim* the provisions of the English Act. But South Australia has made two important departures. On the doctrine of implied agency of the wife to make her husband liable for debts contracted for necessaries the principal Act, the Married

¹ Cf. 21 of 1870-1.

Women's Property Act, No. 300 of 1883-4, s. 14, has introduced a proviso that no such implied agency can exist. The draftsmanship of this provision is very curious, as it is tucked away merely as a proviso to the section dealing with the husband's liability for *prenuptial* debts and contracts.¹

Another matter deserving mention relates to the necessity for joining the husband in a claim in tort against the wife. On this matter the House of Lords and the High Court of Australia are at variance.² In order to clear up this point, the Married Women's Property Act was amended by 1084 of 1912, which specifically provides that "a husband shall not be joined with his wife in any action for any tort of his wife, nor shall he be liable for such tort" (s. 2).

Workmen's Lien.—In 1893 an important Act designed to protect workmen engaged on building contracts, and contractors and sub-contractors similarly engaged, was passed under the title "Workmen's Liens Act," No. 575 of 1893. By this Act a workman secured a lien on the estate or interest of the owner of the land to the extent of four weeks' wages to an amount not exceeding £12. A contractor and sub-contractor obtained a similar lien in respect of work done, or materials supplied, with the assent of the owner. The lien is to be registered and may be noted on the Register of Titles, such notice to operate as a caveat. The lien may be enforced by action, subject to there being moneys payable by the building owner on his contract, but not to prejudice any other remedy which any person may have in respect of contract price or wages due.

Companies.—The legislation under this head followed more or less closely English legislation up to the Consolidating Companies Act of 1892, No. 557. This Act remained the principal Act until 1934.

The subject of company legislation has been much discussed, and it was expected by many that the Commonwealth Constitution, s. 51 (XX), giving the Commonwealth power to legislate for "the peace, order, and good government of the Commonwealth with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth," would enable the Commonwealth to introduce a uniform Companies Act for the whole of Australia. The High Court of Australia, however, held in *Huddart Parker, Ltd. v. Moorehead*³ that this did not entitle the

¹ In *Harrold v. Snowsill*, 25 S.A.L.R. 59, Boucaut J. said that the proviso was "put in for the purpose of protecting the husband against extravagant contracts entered into by the wife—a very proper thing for the Legislature to do."

² Cf. *Edwards v. Porter*, [1925] A.C. p. 38, and *Brown v. Holloway*, (1909) 10 C.L.R. p. 89.

³ 8 C.L.R. 330.

Commonwealth to legislate for their incorporation, but that it could deal with local corporations or companies only when already established under the appropriate State legislation. Attempts to alter the Constitution in order to give the Commonwealth the necessary power have been defeated at the referendum, and the matter is therefore still within the exclusive control of the States. The desirability of uniform legislation is evident, and conferences of Premiers of States agreed from time to time to introduce an Act uniform to each State. A draft was prepared but, in spite of the agreement, was not carried by the various States. South Australia last year then passed a new Companies Act, No. 2196 of 1934. The draftsman has drawn on the corresponding statutes of the other States, as well as on the Imperial statute. This statute has only recently been put into operation, and the profession for the moment are more concerned with the mechanical details of registration, as required under the new Act, than with controversial questions introduced by it. These registration provisions, designed to tighten up some of the deficiencies of the old Act, have involved a good deal of work, but it is as yet too early to appreciate the full importance of the change introduced. Attention, however, may be drawn to Part XIII, imposing on directors, or other persons responsible for the prospectus, liability for false statements, or failure to disclose certain particulars required in the prospectus. Section 50 sets out a long catalogue of the matters to be disclosed, much more elaborate than previously provided. Further, Part XIII also limits the activities of share-hawkers, as it is now an offence under s. 368 for any person to go from house to house offering to any member of the public shares for subscription or purchase, or even to make such an offer in writing, unless he is a person whose ordinary business it is to buy or sell shares, or unless that writing complies with all the requirements of the Act with regard to a prospectus.

Consolidation.—South Australia has been very backward in the matter of consolidation, and until recent years the draftsmanship of the statutes has left a great deal to be desired; in fact, in 1863 the Colonial Office rebuked the local legislature for the failure to observe the formalities laid down in the Constitution Act, *e.g.* as to the passing of certain Bills by a specified majority of both Houses—the neglect of which has led to the legislation being declared invalid. The result is that it is often difficult for any practitioner to be assured that he has looked at all the statutes on a given subject, particularly as at times very important amendments are

introduced in later statutes which appear to have little in common with the Act amended. Even the Criminal Law Acts, which one would think should be made as clear as possible, have not been consolidated for over fifty years, although numerous amendments have been made, and at least one of those amendments dealing with prosecutions for carnal knowledge of female children is to be found in an Act dealing generally with Maintenance of the Destitute, Protection of Married Women and State Children's Welfare.¹ It is now proposed to undertake this very necessary work, and in 1934 two preparatory Acts were passed, namely, the Acts Republication Act, No. 2167, authorizing the Attorney-General to publish all the Acts, except Private Acts and those of limited application, incorporating at the same time amendments to date, and the Statute Law Revision Act, No. 2168, repealing a long list of obsolete Acts, and introducing a number of minor amendments, sometimes merely of a verbal nature, to other Acts continued in force. Under s. 2, subs. IV of this Act, "if the Governor is of opinion that any Act repealed by this section should be revived, the Governor may by proclamation declare that Act to be revived, and thereupon that Act shall be deemed to be revived and to have continued in force from the date of the repeal by this section," but naturally no person shall be held guilty of a criminal offence in respect of any Act between the repeal and the revival.

Juvenile Offenders.—The State has regularly adopted the principle that juvenile offenders require special treatment, and for that purpose has adopted the ordinary practice of the reformatory, as against the prison system.

Trials before courts of summary jurisdiction of offenders under the age of 18 years, in the court's discretion, and if the parent or guardian does not desire a trial by a jury, may be conducted summarily, even though the offence is an indictable offence, except homicide.² The court, even in a case amounting to a minor indictable offence, may dismiss charges against offenders under the age of 14, if the parents or guardians undertake to punish them to the satisfaction of the court.³

A more important step recently taken is to provide for the establishment of a court presided over by a magistrate who has just been appointed to specialize in this department. The court will be conducted in conjunction with a shelter or clinic, whereby the child

¹ No. 1780 of 1926, s. 199.

² Justices Act, 1479 of 1921, s. 161.

³ *Ibid.*, s. 75, subs. 3.

will be kept under observation, and an attempt made to educate it to a proper moral and civic sense in an atmosphere dissociated from that of the criminal courts.

Financial Emergency Legislation.—South Australia was one of the first States to realize the financial emergency, and took independent steps to adjust itself to the position. Later, on May 25, 1931, at a conference between Ministers of the Commonwealth and of the States, a plan, popularly known as the "Premiers' Plan," was agreed on for the purpose of re-establishing financial stability and restoring industrial and general prosperity. Under the terms of this agreement the Financial Emergency Act, No. 2002 of 1931, was passed, revising the rates of interest payable on existing securities, reducing the salary of various public officials and Members of Parliament by varying amounts in the neighbourhood of 20 per cent., and allowing mortgagors to apply under the Local Courts Act of 1926 for reduction in the rate of interest under a mortgage by $22\frac{1}{2}$ per cent., the order being at the discretion of the court (s. 20).

In addition to this provision, farmers who had been badly affected, not only by the prevailing depression in common with other members of the community, but also by the extraordinary drop in the price realized for their wheat, and drought conditions prevailing about this time, were given special relief by the Farmers' Relief Act, No. 1996 of 1931, and the Farmers' Assistance Act, No. 2134 of 1933. Under the former Act, commodities, such as superphosphate, corn sacks, household requirements, etc., might be advanced by the Board, the proceeds of the sale of the applicant's crop being paid to the Board to satisfy costs of advances and payments of other specified debts of the applicant (ss. 13 and 14). In the meantime, certain liabilities of the applicant under mortgage, bill of sale or stock mortgage were suspended for a period of twelve months. This Act was more in the nature of relief from the effect of the drought. The 1933 Act provided similar and more elaborate relief. The legislation has been continued, but the time is approaching when the question of some permanent adjustment of the past and accruing indebtedness will have to be faced.

Conclusion.—Lord Bowen concluded his essay on "Progress in the Administration of Justice during the Victorian Period" by writing, "There is and can be no such thing as finality about the administration of the law. It changes, it must change, it ought to change with the broadening wants and the requirements of a growing country, and with the gradual illumination of the public conscience."

ACTIO PERSONALIS AND THE FRENCH LAW.

[Contributed by F. P. WALTON, ESQ., LL.D.]

Obscure Origin of Maxim.—It is a common belief that lawyers venerate what is old for old times' sake, being in that respect singularly different from the bright youth. A bad old principle which defies right and reason must not lightly be given up for some new-fangled rule of common sense. And courts, as we know, must not be led astray by "that vague jurisprudence which is sometimes attractively styled 'justice between man and man.'"¹ True as this is, it is hard to believe that there will be many to mourn the abolition of the time-worn rule of English law commonly expressed in the maxim *Actio personalis moritur cum persona*.

In spite of research by experts in legal history, the origin of the maxim remains unknown, and a similar obscurity hangs over the rule, connected with the maxim, and sometimes confused with it, that at common law damages are not recoverable for causing death by a tort. Of this rule, commonly spoken of as the rule in *Baker v. Bolton*, more will be said later. Professor Winfield has said recently that the maxim *actio personalis* and the rule in *Baker v. Bolton* are both bad rules, and that he believes further probing of the records might dispel the mystery about their origin.²

As to the maxim *actio personalis*, Bowen and Cotton L.JJ. said, in *Phillips v. Homfray*,³ that "the rule with certain limitations and explanations is as old as the English law." But five years later, in *Finlay v. Chirney*,⁴ Bowen and Fry L.JJ. say, more guardedly, "the maxim is one of some antiquity, but its origin is obscure and post-classical." Possibly the two statements may be reconciled by supposing that in the former case it is the rule of law which the Lord Justices had in mind, whereas in the latter case they were thinking of the form of words in which the rule was expressed.

In the interesting study by Professor Henry Goudy of the maxim

¹ This delightful phrase is by Hamilton L.J. in *Baylis v. Bishop of London*, [1913] 1 Ch. at p. 140.

² 44 L.Q.R. p. 298.

³ (1883) 24 Ch.D. at p. 456.

⁴ (1888) 20 Q.B.D. at p. 502.

Actio personalis moritur cum persona he says that "it was not taken from the Roman law nor from any mediæval civilian, indeed to a Roman lawyer or a civilian it would have sounded nonsensical, yet it has an indirect connexion with the Roman law."¹ This conclusion I take leave to doubt. The maxim, obviously, could not have been borrowed from the Roman law, seeing that it is in flat contradiction with one of the fundamental conceptions of that system from the *Twelve Tables* down, namely that the heir continues the personality of the deceased, takes all the assets and is liable for all the debts, or, at any rate, as in Justinian's time, up to the amount of the assets, if the heir made an inventory.² *Hereditas nihil aliud est quam successio in universum jus, quod defunctus habuerit.*³ *Hereditas enim non heredis personam, sed defuncti sustinet.*⁴ There were, of course, certain rights and liabilities too personal to be transmitted, but these are exceptions. The rule is the exact opposite of that stated in the maxim.⁵ This makes it unnecessary to search for the maxim in the works of the later civilians who belonged to countries whose laws were Romanized.

Maxim at One Time Law of Many Countries.—But it is not to be overlooked that there was a time when the maxim (no doubt with some qualifications) would have correctly expressed the law of France and also the law of England. The very old French law knew no obligations except those *ex delicto*. Breach of contract is looked upon as a delict. And if the debtor dies his heirs cannot be punished.⁶ And it was the same in England. The survival of causes of action was quite exceptional. The rule was that they did not survive. In *Finlay v. Chirney*, Bowen and Fry L.JJ.⁷ discuss the well-known passage of Bracton about the extinction of obligations: "*Item tollitur morte alterius contrahentium, vel utriusque, maxime si fuerit poenalis, vel simplex—si autem duplex, scilicet poenalis et rei persecutoria, in hoc quod poenalis est tollitur, et non extenditur contra haeredes, nec datur haeredibus, quia poena tenet suos auctores, et extinguitur cum persona*" (Folio 101).

¹ *Essays in Legal History* (ed. Vinogradoff), 1913.

² *Inst.* 2.19.6.

³ *D.* 50.17.62.

⁴ *D.* 41.1.34.

⁵ As to delicts the rule is that the action transmitted actively but not passively, except in so far as the heirs of the wrongdoer have profited by the wrong. But the actions called by the commentators *vindictam spirantes*, notably the *actio iniuriarum*, were extinguished by the death of the victim. See Sohm-Mitteis-Wenger, *Institutionen*, 17th ed., p. 454.

⁶ See e.g. Brissaud, *Histoire du Droit Français*, 2, p. 1358, and the references. Cf. in old Germanic laws, Calisse, *History of Italian Law* (in Continental Legal History Series), p. 476; Schröder und Künssberg, *Deutsche Rechtsgeschichte*, 7th ed., p. 824.

⁷ *Ut sup.*

This passage is most interesting and valuable as giving the English law for Bracton's time. We know that at that period, and for long afterwards, many contracts were penal, in the sense that non-performance was treated as a wrong, and punished by a penalty. Professor Goudy says that in this passage Bracton was not following Azo, from whom he took a good deal. But it would have been astonishing if Azo had stated any such rule. He wrote *Roman law*.

Whatever teacher Bracton followed, if he followed any, he does not use the phrase *Actio personalis moritur cum persona*. Professor Goudy says he has found no judicial use of this phrase in the Year Books till *Pinchon's* case, and, so far as I know, no one else has had better luck. It may be there all the same.

In *Pinchon's* case in 1609¹ it is used in the argument of the plaintiff on the writ of error. The suggestion that Coke invented the maxim seems to me without any plausibility. Why invent a maxim and at the same time pronounce a judgment that the maxim is wrong?

After the time of Elizabeth the maxim is common enough, and it is given in Noy's *Grounds and Maxims of the English Law* of which the first edition was published in 1640.² But for a long time the maxim was true in the main both as to contracts and torts. Until the new remedy of assumpsit was established, and it was settled that this lay against executors, it would, generally, be the case that there was no remedy against executors for breach of contract by their testator, unless the action was on a covenant under seal. The technical reason for so holding was that if the action was debt, detinue, or trespass, the testator could have claimed to wage his law, and the executor could not be sued, because the wager was not open to him.³

As to trespass, two old cases may be mentioned.

Newton C.J. in 1440 says: *La Ley est, si on face a moi trespass, et meurt, l'action est mort auxy, pur ce que serra inconvenient a recoverer envers aucun qui ne fuit partie al tort.*⁴

And Fineux C.J. in 1521 comes very near to using the maxim, for he says, "This is not a case where *actio moritur cum persona*, for that is only when the hurt or damage is corporal."⁵

Development of Assumpsit.—Seeing that assumpsit was not conceived as an action of contract, but sounded in tort, being, in fact, an action of trespass on the case, it was difficult for the courts

¹ 9 Coke 86b.

² Goudy, *op. cit.* 226.

³ See Holdsworth, H.E.L. 1, 307.

⁴ Y.B. 19 Hy. VI. Pasch. pl. 10, cited Goudy, *op. cit.* 225, and Holdsworth, H.E.L. III, 577.

⁵ Y.B. 12 Hy. VIII. Mich. pl. 3, cited by Goudy and Holdsworth *ut sup.* Observe that Fineux C.J. does not say *actio personalis*.

to apply to assumpsit a different principle from that laid down in other actions based on torts, and to hold that in it the obligation survived the death of the debtor.¹ After some fluctuating decisions, the court finally took this important step in *Pinchon's* case.² The old learning on the subject will be found gathered up in this case, and it is refreshing to read the broad reasons given by the court for its unanimous decision.

1. "That the testator could not wage his law."

2. "That after the death of the debtor the debt remains, and that it would be a defect in the law, if no remedy should be provided for it."

3. "It is more consonant to justice and common right that the just debt should be paid, than that the executors, who have the goods in another's right, should convert the goods to their own private use, without paying the testator's debts." (90a.)

Maxim not Roman Law.—The maxim *Actio personalis moritur cum persona* assuredly cannot be traced to the Roman law. And I doubt very much if it arose, as Professor Goudy suggests, from some mistaken interpretation of a Roman text.

Rule in *Baker v. Bolton* not Roman Law.—Nor does it seem to me any more likely that the rule in *Baker v. Bolton* owes anything to the Roman law.

There is, it is true, a phrase of Ulpian which reminds one of *Baker v. Bolton*. *Sed cum homo liber perit, damni aestimatio non fit in duplum, quia in homine libero nulla corporis aestimatio fieri potest, sed quinquaginta aureorum condemnatio fit.*³

This is a comment on the Edict *De his qui effuderint vel deiecerint* dealing with the liability of the occupier of a building for damage done to a passer-by by anything which falls from the building. Professor Goudy says it was a "harsh rule," and he makes it harsher than it really was by omitting to mention the 50 aurei.⁴ But, in any case, it is extremely unlikely that this rule as to liability for things thrown down or falling from a building had any influence direct or indirect on the English law.

The conclusion of this slight and imperfect sketch of the history is, we regret to say, wholly negative. The origin of the maxim remains obscure. It is tempting to think that it may have been coined at an early period when it was, in a broad way, a correct statement of the general law.

¹ See Ames, J. B., *Lectures on Legal History*, 95, 130, 166; Holdsworth, III, 443, 451.

² 9 Coke 86b.

³ D. 9. 3. 1. 5.

⁴ *Op. cit.* p. 218.

Injustice of Maxim.—But though the origin of the maxim is obscure, there is no obscurity about its injustice. Sir Frederick Pollock said of it nearly half a century ago, "it has been made at all tolerable for a civilized country only by a series of exceptions."¹ And he describes it in the last edition of *Torts* as "one of the least rational parts of our law."²

There are, it is to be hoped, not many old and settled principles of the common law of which a committee of distinguished lawyers can say, "We have not found any logical explanation or vindication of it."³ There may be champions ready to put lance in rest for *actio personalis*, but, if there are, they are unknown to me. It rather seems as if there were none to praise and very few to love.

It had long been recognized that the maxim involved great hardship. As an example of sheer injustice we may take the familiar case of a claim, arising from a tort, which has been referred to arbitration, with a clause in the order of reference providing for delivery of the award to the personal representative of a party dying before the award is made. If this event happens, then, notwithstanding such a clause, it has been held that the cause of the action is extinguished.⁴

Motor Accidents as Cause of Change of Law.—But so tolerant are we that it is possible the law might have been left alone but for the frequency of deaths due to motor accidents. It is this grievance which in the words of the Committee "has made the reform of this part of the law a matter of the most urgent national importance." If a driver by his negligence caused a collision in which he was killed, then, as there was no action against his representative, the liability of the Insurance Company under the Third Party Risk Policy came to an end, and the other victims or their dependents were left with no redress.⁵

It is significant that the dreadful prevalence of motor accidents has led in various countries to important changes in the law. In France this is the underlying reason why the courts in defiance of the Code have established a rule that the person in charge of an inanimate thing which causes damage to another is presumed to be responsible, and can rebut the presumption only by proof of *vis major* or of an external cause which cannot be imputed to

¹ *Torts*, 1st ed. (1887), p. 53.

² 13th ed. (1929), p. 62.

³ Law Revision Committee, *Interim Report*, p. 3 (Cmd. 4540).

⁴ *Bowker v. Evans*, (1885) 15 Q.B.D. 565.

⁵ *Interim Report*, p. 4.

him.¹ A distinguished French writer, M. Ripert, says that the numerous motor accidents are *la raison profonde et cachée qui a poussé un jour la jurisprudence à rompre avec la tradition*.²

The new English law does not go nearly so far as this, but it is a step in the same direction.

Arbitrary Interpretation of Maxim.—Of course, for centuries past, the maxim *actio personalis* has not meant what it says. The interpretation put upon it has been an artificial one.

A foreign lawyer informed that the English law had a rule *actio personalis moritur cum persona* would suppose, naturally enough, that any personal right of action determined by the death of either of the parties or of both. It would surprise him to learn that, though the maxim is cited *simpliciter*, its meaning had to be discovered from a careful study of the cases. An action of which the cause is breach of contract is an *actio personalis*, but the maxim did not apply to it, except in the case of an action for breach of promise of marriage.³ Nor, as to torts, was the maxim a correct statement of the law. There were important statutory exceptions, some of which go back more than six hundred years. Broadly speaking, actions for injuries to property survived, subject to conditions as to the date of the injury, and the time within which the action must be raised. And, besides the statutory exceptions, there was an important exception which had been created by judicial decisions. This is that when, as a direct result of a wrongful act done by a person since deceased, property of another person has been appropriated, his personal representative was liable if this property or its proceeds could be traced to the assets of the deceased.⁴ English judges, in fact, applied here the principle of liability for unjust enrichment so familiar to continental lawyers, as underlying the *actio de in rem verso*.⁵

So that, stated in a rough and summary way, the result was that the maxim *actio personalis moritur cum persona* applied to those torts which consist in injuries to the body or to reputation. Until the new law, actions for torts of these kinds abated by the death of either party

Rule in *Baker v. Bolton* differs from Maxim.—And, closely connected with the maxim *actio personalis*, we have the rule in *Baker v.*

¹ *Chambres réunies*, 13 févr. 1930, D. 1930, I. 57.

² *Gaz. Pal.* 1925, févr. 113, cited in *Revue Trimestrielle*, 1925, p. 815.

³ See *Quirk v. Thomas*, [1916] 1 K.B. 516, as to the question whether the action may survive for certain special damage.

⁴ *Phillips v. Homfray*, (1883) 24 Ch.D. 439. The principle can be traced back to Elizabethan time. See *per Bowen L.J.* at p. 457.

⁵ See Amos and Walton, *Introduction to French Law*, p. 202.

*Bolton*¹ that "in a civil court, the death of a human being could not be complained of as an injury."

It must be carefully noticed that this rule goes farther than the maxim. The maxim *actio personalis* applied only when one of the parties had died. But in such a case as *Baker v. Bolton*, when the action was by a husband for damage which he has suffered by the death of his wife caused by the negligence of the defendant, or in such a case as *Osborn v. Gillett*,² where a master sued for the death of his servant, to hold that the death of the wife or the servant is not a cause of action is to lay down a rule which is not covered by the maxim, for the plain reason that both parties to the action are alive.

Its Injustice.—The rule in *Baker v. Bolton* is devoid of merit from the point of view of common sense, or of "that vague jurisprudence which is sometimes attractively styled 'justice between man and man.' " But as a rule of the common law it received the conclusive approval of the House of Lords in 1917.³ Before that time it had been followed in cases familiar to all students⁴ and had been adopted by the Supreme Court of the United States⁵ and by the Supreme Court of Canada.⁶

No doubt, many of the judges who applied the rule did not like it. Thus, Scrutton J. (as he then was) said of the rule, "Why this should be so, if the matter were open to us to consider, is a matter of great doubt, but I think it is determined by authority."⁷

The Amerika.—The argument against it was put strongly and clearly by Bramwell B. (as he then was) in his trenchant dissenting judgment in *Osborn v. Gillett*—a *locus classicus* in this subject.

Sir William Holdsworth has been one of the keenest critics of the rule, even to the length of maintaining that the House of Lords should have taken their courage in both hands in *The Amerika*, and have declined to follow *Baker v. Bolton*.⁸ But it is clear from the speeches of the learned lords who took part in the decision in *The Amerika* that they were not relying solely on the rule because it had

¹ 1808, 1 Campb. 493.

² 1873, L.R. 8 Ex. 88.

³ *The Amerika*, [1917] A.C. 38.

⁴ *Osborn v. Gillett*, 1873, 8 Ex. 88; *Clark v. London Gen. Omnibus Co.*, [1906] 2 K.B. 648.

⁵ *The Harrisburg*, 1886, 119 U.S. 199.

⁶ *Monaghan v. Horn*, (1882) 7 Can. S.C.R. 409.

⁷ *The Amerika*, [1914] P. at p. 189. Cf. per Kennedy L.J. in *Jackson v. Watson*, [1909] 2 K.B. at p. 206.

⁸ H.E.L. 3rd ed. III, Appx. VIII. And see his remarks in L.Q.R. XXXII, 431.

been laid down at *Nisi Prius* by Lord Ellenborough.¹ In their view the rule that in a civil court death cannot be complained of was not launched by Lord Ellenborough as a bolt from the blue. Ellenborough was applying a rule which was traditional and familiar in his time. Whether this is historically true or not, I do not argue with Sir William Holdsworth—*Quid enim contendat hirundo cygnis?*

But if the learned lords believed it to be true there is surely great force in Lord Loreburn's opinion, "When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it."²

As judges they were faced with the very significant fact that in all the long record of decisions no case had been found in which (apart from statute) an action of damages for death had been sustained.³ Nor, with all possible respect to Bramwell B., is the Preamble to the Fatal Accidents Act to be lightly set aside as evidence of what the legislature thought in 1846.⁴ "Whereas no Action at Law is now maintainable against a Person who by his Wrongful Act, Neglect, or Default may have caused the Death of another Person."

Before Lord Campbell's Act of 1846, we may take it that if A killed B on the spot, intentionally or negligently, A was in the enviable position of being secure from having to pay damages. If A injured the body of B without killing him, A was liable in damages, but if either A or B died before judgment there was an end of the matter, so far as civil liability is concerned.

The coming of the railways led to Lord Campbell's Act, just as the motor car has led to the law of 1934. Long-suffering as the English public is, it did strike them as odd that if a railway company killed the breadwinner on the spot, his destitute family had no consolation except to reflect on the rule in *Baker v. Bolton*.

Lord Campbell's Act.—Lord Campbell's Act was, pretty certainly, inspired by the Scots law, but it did not allow *solatium* as that system does.⁵ It was a badly drawn Act, but it has prevented a vast

¹ Campbell has left it on record that he reported only those decisions of Ellenborough which he considered sound. "At the end of my fourth volume I had a whole drawer full of bad Ellenborough law" (D.N.B. VIII, 380). But he did not put *Baker v. Bolton* in this drawer. He put in a note to the case: "Q. If the wife be killed on the spot, is this to be considered *damnum absque injuria*?" This may be "wrote sarcastic," but I doubt it.

² At p. 41.

³ See *per* Lord Sumner, at p. 55.

⁴ See his contemptuous remarks in *Osborn v. Gillett*, at p. 95.

⁵ See Sir F. Pollock's note, *Torts*, p. 68, and *Blake v. Midland Ry.*, (1852,) 18 Q.B. 93, in argument for plaintiff there cited. The Workmen's Compensation Acts also restrict the application of the maxim.

amount of injustice. It gave the surviving wife, husband, parent and child a claim in respect of the pecuniary loss which they had themselves sustained, but it did not give to the personal representative any action in that character. The new law does not repeal the Fatal Accidents Act, and claims may now be made in appropriate circumstances under both Acts.¹ It amends the Fatal Accidents Act by giving to an illegitimate child, or a child legally adopted, the same rights as a legitimate child has.

Law Reform (Miscellaneous Provisions) Act, 1934.—The new law² runs a pen through the rule *Actio personalis moritur cum persona*, so far as that maxim was applied.

By implication it invalidates the doctrine laid down in *Phillips v. Homfray*.³ The defendant is not to escape because he has not appropriated specific property belonging to the plaintiff, but has merely done damage by a trespass, even though this trespass has been of pecuniary advantage to the defendant.

But the Act of 1934 contains limitations and qualifications all of which, to me at least, appear wholly admirable.⁴ The broad rule in future is to be that causes of action survive actively and passively. But certain actions are regarded as purely personal, and they still die with the person whether he be plaintiff or defendant. These are actions for defamation, or seduction, or for inducing one spouse to leave the other, or to live apart from him, and also claims for damages on the ground of adultery with the wife of a petitioner.

But though the new law has, subject to the qualifications above stated, abolished the maxim *actio personalis*, it has not abolished the rule in *Baker v. Bolton*. If a similar case to *The Amerika* were to come up to-morrow, the same decision would have to be given.

If the action for death is brought by anyone outside the circle of persons named in Lord Campbell's Act, a circle now enlarged by the illegitimate or the adopted child, the old rule remains in force.

The only changes made by the new Act are (1) a claim for damages sustained by the deceased up to the time of death has vested in him

¹ See *Slater v. Spreag*, (1935) 51 T.L.R. 577 (Mackinnon J.); *Rose v. Ford*, (1935) 52 T.L.R. 7.

² Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41. It does not extend to Scotland or Northern Ireland.

³ (1883) 24 Ch.D. 439.

⁴ Damages, when the action survives, not to include exemplary damages; in action for breach of promise of marriage damages (when action survives) to be limited to damage caused to estate of deceased; when death has been caused, damages shall be calculated without reference to the loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

and passes to the personal representative, and (2) a claim for funeral expenses is available to the personal representative.

The Reports of the Committee do not explain why they did not recommend abolishing altogether the rule in *Baker v. Bolton*. Probably it was because they thought this would open the door to claims that went farther than justice required. Cases are, no doubt, conceivable in which collateral relatives, or even strangers in blood, suffer pecuniary loss by the death of another. If, for example, the deceased was the sole support of an invalid sister there seems no good reason why she should not have a claim?

So far as concerns brothers and sisters, it seems to me that the new Act might have added them, subject, of course, to the necessity of their proving direct pecuniary loss. But the legislature has not done so. To go farther than brothers and sisters would be to let in a good many doubtful claims. This is shown by the French cases to be mentioned later.

Judicial Interpretation of New Act.—There has not been time for much judicial interpretation of the new Act, but one important question has come up for decision, and upon it there has been a difference of judicial opinion. Is there a claim for damages suffered by the deceased for the shortening of his expectation of life?

In an action of damages for personal injuries brought by a living plaintiff, the judge (sitting without a jury) took into account, in estimating the damages, that the plaintiff's expectation of life had been shortened and the Court of Appeal by a majority (Roche L.J. dissenting) dismissed an appeal from this judgment.¹

The bearing of this decision on claims under the new Act has been considered by Mackinnon J. in *Slater v. Spreag*,² and later by the Court of Appeal in *Rose v. Ford*.³

In *Slater v. Spreag* the action was brought by the widow of a man who had been run over by a motor car. He had survived the accident for two days, but during all that time had been unconscious. The widow claimed under the Fatal Accidents Act, and also under the new Act.

Mackinnon J. refused to give damages for pain and suffering caused to the deceased, or for distress caused by knowing that his expectation of life had been shortened, on the ground that the deceased had been unconscious. He explained *Flint v. Lovell* as meaning that when the victim of an accident retained conscious-

¹ *Flint v. Lovell*, [1935] 1 K.B. 354.

² (1935) 51 T.L.R. 577.

³ (1935) 52 T.L.R. 7.

ness, his knowledge that his expectation of life was shortened might be an element to consider. It was part of his pain and suffering.

In *Rose v. Ford* the action was by parents for the death of a daughter. She had been run over and had survived for some days. One of her legs had to be amputated. The action was brought under Lord Campbell's Act and also under the new Act. The trial judge (Humphreys J.) awarded £300 under the former Act and £500 for pain and suffering to the deceased and for the loss of her leg. He refused to award damages for shortened expectation of life.

On appeal the damages under the new Act were reduced from £500 to £22. Greer L.J. in a dissenting judgment expressed the opinion that damages of £1,000 ought to be given for shortened expectation of life.

Slessor and Greene L.JJ. were of opinion that the principle of *Flint v. Lovell* was not to be extended. There the claim was by a living person. But when the action is by the administrator the claim is for loss of the deceased's life. It is a claim not originally vested in the deceased. The deceased had no claim for her own death. In the language of Greene L.J., "Subsection I of Section I of the Act of 1934 did not create new causes of action. It merely prevented existing causes of action from being extinguished by the death of the person in whom they were vested as had formerly been the case wherever the doctrine *actio personalis moritur cum persona* applied. It would not be correct to say that Miss Rose had at the moment of her death any cause of action vested in her under which she could claim damages for her own death, and her administrator could be in no better position."

French Law.—We may now turn to examine briefly the French law on this matter.

As we have seen, there was a time when the maxim *Actio personalis moritur cum persona* applied in the French law. But this was only in the very early period. For many centuries, however, and down to the coming into force of the *Code Napoléon*, the principle of the unity of the estate—*l'unité du patrimoine*—did not exist except in the *pays de droit écrit*. Under the *coutumes* the estate was divided into several masses which passed to different heirs. Movable debts fell to be paid by the heir to the movables and *acquêts*.

Unity of Patrimoine.—The *Code Napoléon* introduced the old principle of the Roman law that the estate of a deceased person formed a single mass—*le patrimoine*—that it included all rights of action vested in the deceased, and that the heir was liable for all his

debts. By accepting with benefit of inventory he could limit his liability to the amount of the assets of the succession. The broad principle, then, of the French law is the opposite of the maxim *Actio personalis moritur cum persona*. The universal successors take the whole estate, are entitled to sue for all the claims and are liable (subject, it may be, to benefit of inventory) for all the debts.¹ As it has been expressed, *Au décès de la personne, le patrimoine ne disparaît pas, il conserve son unité, et sous le nom d'hérédité il est transmis automatiquement aux successeurs du défunt*.²

Non-transmissible Rights.—But there are certain rights which are intransmissible by their nature or by some special provision of law.³ Such are, for example, the right of usufruct;⁴ the loan of a non-fungible, if made as a favour to a particular person;⁵ a life-rent.⁶ A mandate terminates by the death of either the mandator or the mandatory.⁷ The contract of lease of work comes to an end by the death of the workman.⁸ Exceptions such as these in no way invalidate the principle that rights and claims are transmissible.

In regard to actions arising from tort, the rule of the French law is that they transmit actively and passively. A claim for damages is an element of a man's estate and it passes like other elements of his estate to his legal successors. And a liability to pay damages for a tort is a debt which transmits like other debts.

When the claim is for damage caused to property of the deceased there is no room for doubt. But when the claim is based on injury to the person or to the reputation of the deceased there is more difficulty.

Disputed Questions in Law of Torts.—Certain questions have been much debated.

When the claim is for *solatium*, i.e. for pain and suffering, it may be that the deceased had raised the action and it was pending at his death. In that case, the general view is that the heirs can continue the action.⁹ But even this is disputed.¹⁰ And, at any rate, when the victim of the injury has died without raising action there is room for serious doubt.

When the victim of the injury has survived for some considerable time it will almost always be the case that he will have suffered

¹ Aubry et Rau, 5th ed., IX, § 583.

² Capitant, *Introduction*, 5th ed., § 93.

³ Aubry et Rau, 5th ed., IX, p. 392.

⁴ C.C. 617.

⁵ C.C. 1879.

⁶ C.C. 1980.

⁷ C.C. 2003.

⁸ C.C. 1795.

⁹ Aubry et Rau, 5th ed., 6, § 445, p. 355; Sourdat, I, n. 59; Beudant, *Contrats et Obligations*, n. 1295; *Montpellier*, 13 mai 1931, D.H. 1931, p. 405.

¹⁰ Planiol et Ripert, VI, n. 658.

material as well as moral loss. A right to claim damages on both these heads, pecuniary loss and physical suffering, will, according to one view, have vested in him.¹ But it is said by many writers that the claim, so far as it is based on *solatium* for pain and suffering, does not transmit, though the claim for pecuniary loss caused to the deceased is transmissible.²

Instantaneous Death.—When the victim of the injury was killed instantaneously a still more difficult question arises. Did a right of action for damage caused to him by his own death vest in the deceased person, and, if so, did it transmit to his heirs?

Upon this matter the French law is as yet quite unsettled.

On the one side it is argued (1) that as the death was simultaneous with the injury there was no time for any right arising from the injury to vest in the deceased; and (2) the death did not cause any pecuniary loss to the deceased. The first point needs no amplification. As to the second point, it is urged that a man's life is not a part of his pecuniary assets. If he dies he does not suffer a pecuniary loss. It is inconceivable that a man should have a right of action for damages caused to him by his own death. And if such a claim were allowed, how could a court estimate the damages? The person killed might have lived only a week, or he might have lived fifty years. He might have made a great fortune or he might have died a bankrupt. We are in the region of pure speculation.

On the other side it is maintained that there is always an interval, however short it may be, between the injury and the death—*un instant de raison*—and that this is enough to enable the right to vest.³

But even if we suppose that the injury and the death occur at the same instant, this is not fatal to the claim. The victim dies in the instant when he acquires the claim, *il meurt de sa créance*.⁴ And on the question of damage, it is urged that a man's life is the most precious of his possessions, and to deprive him of that is to cause him damage both moral and material. By his death he suffers pain, for however short a time, and his estate is deprived of that intelligence and force which supported it and held it together.⁵

¹ Mazeaud, *Responsabilité*, 2, n. 1908; *Cass. Belge*, 30 juin 1930, *Rev. Trim.*, 1931, p. 693.

² Planiol et Ripert, VI, n. 658; Beudant, l.c. Aubry et Rau, 5th ed., 6, p. 355. A recent decision of the Tribunal de la Seine supports this view (*Trib. Seine*, 13 janv. 1934, *Revue Trimestrielle*, 1934, p. 401).

³ *Angers*, 13 mai 1929, *Dall.* 1929, 2. 161.

⁴ Mazeaud, *Responsabilité Civile*, 2, n. 1913.

⁵ Mazeaud, 2, n. 1911.

Neither the decisions nor the writers agree upon these questions. A considerable number of writers, however, support the opinion that there is, or may be, an action for instantaneous death, and that it is transmissible.¹

It is worth noting that the other view is adopted in some of the Codes. Neither the Swiss Code of Obligations nor the German Code admits a claim of damages for the death itself. The heirs have a claim for funeral expenses under both codes; and under the German Code, if the deceased was liable to pay alimony to a third party, this third party will have a claim against the wrongdoer. But in that there is nothing of a representative character.²

And we have seen above that the English law from an early period has consistently supported the theory that there is no pecuniary compensation for death itself. The claims admitted by Lord Campbell's Act and by the new law do not militate against this theory. Under the statutes certain persons are given claims for loss which they have themselves suffered.³

Claims in French Law Analogous to Claims under Lord Campbell's Act.—The reason why in the French law there is still doubt as to whether in the case of instantaneous death caused by a wrongdoer a right of action vested in the deceased is, probably, because the case rarely presents itself. In most circumstances, another remedy is, available. Not being embarrassed by a rule like *actio personalis* the French law was always able to admit the claims of dependents of the victim of the injury for reparation of the loss caused to them by his death. There was no necessity in France for legislation analogous to Lord Campbell's Act. The broad principle of the Code covered the case. Every wrongdoer who causes damage to another must repair the loss.⁴

When, as in this case, the damage suffered by the plaintiff is due to a wrong committed initially against another the plaintiff is sometimes said to have suffered damage *par ricochet*.⁵ This is a happy description of the situation. The plaintiff has been hit by a shot which was not aimed at him. But the fact remains that his action is one for a wrong done to *him*. It is an independent action and has nothing to do with the deceased person's succession. As we know, in the English law actions of this nature have been allowed by

¹ Mazeaud, *ut sup.*; Planiol et Ripert, VI, n. 658; Aubry et Rau, 5th ed., VI § 445, note 2 *ter*.

² *Code Obl. Suisse*, Art. 45. See Rossel et Mentha, *Droit Civil Suisse*, III, p. 78; B.G.B. Art. 844.

³ *Rose v. Ford*, *ut sup.*

⁴ C.C. 1382.

⁵ Mazeaud, 2, n. 1872.

statute only to certain classes of persons. The new law has somewhat extended the number of classes, but the list is still a limitative one. In France, where such actions are based on the general rule of the Code there are no fixed limitations.

Liberality of French Law.—The French courts have shown a liberality in admitting such claims which has gone, in some cases, to an extreme length.

We must remember that the French law distinguishes between material damage, *i.e.* pecuniary loss suffered by the plaintiff, and moral damage, *i.e.* pain and suffering for which he claims *solatium*. In many cases the plaintiff claims under both these heads of damage. But there are cases in which no material damage can be shown, and the action is purely for *solatium*. Some of the writers argue that the Code gives no power to the courts to award damages for moral prejudice by itself unless this moral prejudice has resulted in material loss. It must be *un véritable dommage matériel ayant une cause morale*.¹ Otherwise, how is it possible for a court to estimate the amount of the damage suffered? But most writers do not dispute that an action purely for *solatium* is competent.² And the jurisprudence in the civil courts is settled in this sense.³ The administrative courts have, however, declined to follow the civil courts on this point. The *Conseil d'Etat* has refused reparation for moral damage unless in connexion with pecuniary loss.⁴

Claims based on Material Damage.—To take first cases in which material damage is averred.

In the French civil courts an action for damages caused to the plaintiff by the death of a third party may be brought successfully by any person, whether a relative of the deceased or not, who can prove that the death caused him a loss which is certain and not merely hypothetical, unless—and here there is dispute—the tie between the plaintiff and the deceased person was an immoral one. Thus the business partner of the deceased might succeed in such a claim.⁵ And a case, in which the facts closely resembled those in the English case *The Amerika* previously discussed, affords a clear

¹ Dalloz, *Supp. vo. Responsabilité*, n. 280; Baudry-Lacantinerie et Barde, *Obligations*, IV, n. 2871.

² Mazeaud, *Responsabilité Civile*, I, n. 304, and authors cited; Lalou, *Responsabilité*, 2nd ed., n. 150.

³ See, *e.g.*, *Paris*, 1er févr. 1910. *Dall.* 1912, I, 209; *Paris*, 19 juin 1929, *Gaz. Pal.* 1929, 2, 365, where 100,000 francs were awarded to parents for the death of their child. See Mazeaud, I, n. 319.

⁴ *Cons. d'Etat*, 24 mai 1916, *Dall.* 1922, 3, 22.

⁵ *Lyon*, 31 mai 1930, *Dall.* 1930, 2, 64.

illustration of the rule of French law, and shows how it contrasts with the English common law.

A French officer in the army, while in the discharge of his duties, was killed in a railway accident. His widow obtained a pension from the Ministry of War. The government then sued the railway company by whose fault the accident happened, and obtained judgment for a capital sum of which the income would be equivalent to the pension.¹

The only doubt which remains when the claim is for material damage is whether the claim is excluded if it arises from an immoral relationship. As to this there has been much discussion, and the decisions are difficult to reconcile.

The Case of the Concubine.—In a number of cases actions of damages have been brought by the concubine of the man who had been killed. In several of these cases damages have been awarded for material prejudice.

The Criminal Chamber of the Court of Cassation in one case thus formulated the general principle: "*Attendu que l'article 1382 c. civ. en ordonnant, en termes absolus, la réparation de tout fait quelconque de l'homme qui cause à autrui un préjudice, ne formule aucune distinction en ce qui concerne la nature du dommage éprouvé, et, en cas de décès de la victime, la nature du lien d'où résulterait un préjudice actuel et direct pour celui qui demande la réparation.*"²

In a later decision the same Chamber rejected a *pourvoi* against a judgment which had held that the state of concubinage being essentially precarious and unstable the plaintiff had not shown that she had suffered *un préjudice actuel et certain*.³ The Court of Cassation leaves the courts below free to find as a fact that the loss suffered was certain and not hypothetical, and it will not interfere with such a finding.

In one case the Court of Paris has availed itself of this liberty by awarding damages to two concubines of the same man. With one he had lived for twenty-six years, and she bore his name. The other likewise bore his name, and had a child by him. The court gave an indemnity to the former, because her situation "*peut être dans une certaine mesure assimilée à celle d'une femme légitime*, and to the latter because she had been receiving an allowance for the child.

¹ *Paris*, 3 mars 1909, Sirey, 1910. 2. 5.

² *Crim.*, 26 nov. 1926, Dall. 1927, 1. 73.

³ *Crim.*, 9 nov. 1928, Dall. 1929, 1. 23. Cf. *Req.*, 17 févr. 1931, Dall. 1931,

M. Demogue says, "*Une telle décision aboutit à la consécration légale, non de l'union libre, mais de la polygamie.*"¹

Some writers maintain that the courts should refuse reparation in such cases upon the ground that no *intérêt légitime* has been infringed. The tie between the paramour and the concubine was not only not legal but was reprobated by the law.²

Claims based on Moral Damage only.—When the claim is for moral damage alone there has not been, so far as I know, any case in which the concubine has succeeded in obtaining damages.³ And a recent decision of the *Chambre des Requêtes* supports the view that claims based on moral damage only should not be open to persons not connected with the deceased by blood or marriage. "*Il faut que l'indemnité soit fondée sur un intérêt d'affection né du lien de parenté ou d'alliance qui unissait la victime du fait dommageable à celui de ses ayants droit qui en réclame réparation.*"⁴ This view has the support of several writers.⁵ It certainly appears desirable to impose some limit.

Reparation of moral damage was in the earlier period restricted by the courts to persons whom the deceased was bound by law to support—spouse, children, ascendants.⁶ But there was in the Code no basis for any such restriction, and in subsequent cases damages for moral prejudice have been awarded to brothers and sisters,⁷ to a sister-in-law,⁸ and even to a friend who had been living with the deceased but was not related to him in any way.⁹

The recent decision of the *Chambre des Requêtes* referred to in discussing such claims by a concubine marks a reaction. The obvious difficulty is that the Code gives no justification for making any limitation. But despite that awkward fact it is possible that the courts may succeed.

By an unnatural interpretation of C.C. 1384 the French courts have now definitely succeeded in altering the law as to liability for damage caused by an inanimate thing, by creating an almost irrebuttable presumption of fault against the person in charge of it.¹⁰

¹ *Paris*, 18 nov. 1932, *Revue Trimestrielle*, 1933, 81.

² Lalou, *op. cit.*, n. 161; Mazeaud, *op. cit.*, I, n. 327. The authors are speaking here of moral damage, but the same rule should apply to both. Cf. Planiol et Ripert, *op. cit.*, VI, n. 549.

³ Lalou, n. 158.

⁴ *Req.*, 2 févr. 1931, *Dall. Hebd.* 1931, p. 113.

⁵ Planiol et Ripert, VI, n. 549; Demogue in *Rev. Trim.* 1931, p. 393.

⁶ *Douai*, 23 janv. 1899, *Sir.* 99, 2, 296; Lalou, n. 156.

⁷ *Crim.*, 15 déc. 1923, *Dall.* 1924, I, 69.

⁸ *Crim.*, 31 oct. 1930, *D.H.* 1930, p. 572.

⁹ *Crim.*, 28 févr. 1930, *D.* 1930, I, 49.

¹⁰ See Amos and Walton, *Introduction to French Law*, p. 262.

The motives of the courts were entirely good, and the results were approved of by public opinion, though lawyers nourished doubts. Something similar may happen in this case. That reparation should be given for the pain caused by the death of a husband or father is reasonable enough. But to award damages on this head to persons not connected with the deceased by blood or marriage rather shocks the sense of justice.

Actions of Libel.—Besides the question as to the survival of actions for damages caused by death, there is another case in which it is extremely controversial whether the right of action survives. This concerns actions to vindicate character or to recover satisfaction for an insult.

In actions for defamation the primary purpose of the action is, frequently, not to make money but to clear the plaintiff's character. It is for this reason that when a libel has been published in a newspaper, and material damage has not been proved, French courts will often content themselves with ordering the editor of the newspaper to publish the judgment finding the libel proved.¹

It is clear that actions for libel are of a very personal character. The person affronted is the guardian of his own reputation, and he is the best judge of the advisability of raising an action. If he lived for some time after the insult which he received, and took no steps about it, it may be a natural presumption that he either forgave the affront, or thought he was best protecting his reputation by avoiding publicity. The result was that if the injured man had not raised an action his heirs could not do so. This was the traditional view of the old French law.² In this, it followed the Roman law as to *actiones meram vindictam spirantes*. *Iniuriarum actio in bonis nostris non computatur, antequam litem contestemur*.³

In the modern French law it is generally agreed that if the deceased had raised an action for *injures* or *diffamation* his heirs can continue it.⁴ But even in this case, if there was no material damage, some writers deny the heirs the right to continue the action.⁵ If, however, the deceased died without instituting an action, are his heirs entitled to raise one?

¹ Sourdat, *Responsabilité*, I, n. 135.

² Pothier, *Obligations*, n. 674; Merlin, *Rép. vo. Injure*, s. 6.

³ *Dig.* 47, 10, 28; Windscheid, *Pandekten*, 8th ed., 2, s. 359; Sohm-Mitteis-Wenger, *Institutionen*, 17th ed., 454.

⁴ Aubry et Rau, 5th ed., 6, p. 355; Baudry-Lacantinerie et Barde, *Obligations*, 3rd ed., 4, n. 2884; Mazeaud, *Responsabilité*, 2, n. 1921.

⁵ Planiol et Ripert, n. 658. But see Montpellier, 13 mai 1931. D. H. 1931, p. 405.

Does Claim for Moral Damage Survive?—This question is still controversial. The better opinion would seem to be that they can do so only in so far as they sue for reparation of material loss caused to the estate of the deceased. It is, of course, possible that the defamation has caused material loss. A statement that a merchant was an embezzler may have ruined his business. But, when material loss is not averred, the heirs are not entitled to sue in respect of moral damage which he has sustained. Why should they make a profit out of humiliation which they have not suffered? ¹ Such a claim is highly personal, and the reasons why it should not pass to heirs are even stronger than those which exist as to claims for physical suffering. ²

This view, however, is not supported by all writers. MM. Mazeaud argue that an action for moral damage is transmitted to heirs no less than an action to repair material loss. ³ But, on the whole, it rather seems that the French law is moving to the position advocated by MM. Planiol et Ripert that claims based on moral damage only never transmit to heirs unless the deceased had raised the action. ⁴

German Law and Swiss Law.—This is in accordance with the German and the Swiss Codes.

In the German law the right to claim moral damages for a wrong is much restricted. In regard to defamation it is only when pecuniary damage has been caused that damages can be awarded. Wilful defamation is a criminal offence, and when pecuniary damage has been suffered the victim may claim either a judicial penalty not exceeding 6,000 marks, or damages (*Strafgesetzbuch*, Arts. 186–8). No action lies for negligent defamation unless pecuniary loss has been suffered and no damages can be awarded in excess of such pecuniary loss. There is no claim for moral damages except in certain enumerated cases—injury to the body, injury to the health, privation of liberty, and certain sexual offences against women. In the cases where the claim to moral damages exists it is strictly personal and does not transmit to the heirs of the victim. ⁵

Under the Swiss Civil Code an action lies for moral damages in certain enumerated cases, but the action is non-transmissible, except in the case of breach of promise of marriage, when it is transmissible

¹ Aubry et Rau, 6, p. 355; Planiol et Ripert, 6, § 658.

² See *supra*, p. 51.

³ *Responsabilité*, 2, n. 1921.

⁴ VI, n. 658. See Lalou, *Responsabilité*, n. 152.

⁵ Arts. 847, 1300; cf. Art. 253; Cosack, *Lehrbuch*, 6th ed., I, p. 678, 2, a.; Schuster, *German Civil Law*, pp. 186, 340.

if the claim had been admitted by the defendant, or action had been brought before the death of the *de cujus*.¹

But when an assault or a slander has caused pecuniary damage it appears that the right of action passes to the heirs.²

Why Question is Still Doubtful in French Law.—The reason why this question has remained unsettled is, probably, the fact that in many cases the heirs have another remedy.

So far as clearing the reputation of the deceased is concerned, they can bring an action claiming nominal damages (usually one franc) and demanding publication of the judgment.³ But besides this, a relative of the deceased, whether he be an heir or not, can claim damages if he can show that he has suffered damage either material or moral by the libel. An injury to the good name of his family affects *him*.⁴

Libel on the Dead.—For a fuller explanation of the French law upon this matter I may be permitted to refer to an earlier article by the present writer in this *Journal* upon Libel on the Dead.⁵

¹ Arts. 28, 93 ; *Code Féd. Oblig.*, Arts. 48, 49.

² Rossel et Mentha, *Droit civil suisse*, I, p. 91.

³ Planiol et Ripert, VI, n. 658. Cf. Sourdat, *Responsabilité*, I, n. 62.

⁴ Planiol et Ripert, VI, n. 549 ; Mazeaud, *Responsabilité*, 2, n. 1926.

⁵ *Journ. Comp. Leg.*, Third Series, vol. ix, pt. i, p. 1.

THE LAW AND CONSTITUTION OF SARAWAK.

[Contributed by T. STIRLING BOYD, ESQ., *Chief Justice of Sarawak.*]

Beginnings in Sarawak.—The territory which is now known as Sarawak is a tract of land on the north-west coast of the Island of Borneo. It has a coast-line of about 500 miles and an area of about 50,000 square miles, with a population estimated, in 1935, at 443,000, which includes a large number of different tribes, Malays, Dayaks, Melanaus, Muruts, Punans, Kayans, Kelabits and others. There are also some Chinese, many of whom are Sarawak born, and a few Indians and other non-indigenous races. It is considered to be a Malay country. It is proposed in the following notes to give a short account of the law and constitution of Sarawak, but before doing so it is important to give a short account of the early history of the country and of the principles on which the administration was based.

Before 1841 Sarawak was part of the dominions of the Sultan of Brunei, but in romantic circumstances which there is not here space to narrate it was ceded in that year to James Brooke, who became first Rajah. Two questions are here raised, namely, whether as a British subject Brooke could legally attain the position of being the independent ruler of a foreign territory and, if so, whether he was bound to administer English law. These questions are of great interest to the jurist, but actually they are purely academic, as in fact Brooke governed the country as an independent sovereign and imposed such laws as he thought fit, administering in the meantime "natural equity." "I hate," he wrote in 1842, "the idea of a Utopian government, with laws cut and dried ready for the natives, being introduced. . . . I am going on slowly and surely basing everything on their own laws, consulting all the headmen at every step, instilling what I think right—separating the *abuses* from the customs." It must be remembered that the immediate objects of the Rajah were urgent, as he had first of all to establish a peaceful government and to quieten the unrest which he found in the country, and in particular to suppress piracy and head-hunting. It is clear that in such conditions a scientific system of law would have been superfluous.

In 1841, Brooke issued "a brief code of regulations" and "instituted a Court of Justice. . . ." The regulations consisted of eight clauses, the first of which was that "murder, robbery, and other heinous crimes will be punished according to the written law of Borneo, and no person committing such offences will escape if, after fair inquiry, he be proved

guilty." Other clauses declared that trade was to be free, roads were to be opened, and that the revenue was to be inquired into and fixed at a proper rate.

No attempt was made to define "murder," "robbery" or "other heinous crimes," but in fact no such strict definition would, in the early days, be necessary. If a prisoner were charged with murder, it would usually be easy to decide on the facts whether and how his conduct deserved to be punished. Or if a man were charged with theft it would ordinarily be clear whether he took dishonestly something which did not belong to him. Questions such as whether he took it with the intention of permanently depriving the owner, or in whose possession it was, and so on, would not arise.

In 1842 Brooke prepared, but did not publish, a further code. "I followed in preference the plan of doing justice to the best of my ability in each particular case." He further stated his views in a letter which was probably written in 1847, when he returned to England for the first time. Writing to three magistrates whom he had appointed to form a Board in his absence he said :

The magistrates are not, therefore, bound to administer justice according to the letter of the English law, but to judge in equity between man and man, upon the broad and immutable principles of justice. . . . To such a court the multiplied forms, rules, motions, notices, and technicalities of British law would be a serious detriment and hindrance ; in rejecting all such, as inapplicable and useless clogs, they will retain the grand foundation of British law, which is the eternal principle of justice.

It has always been understood that the "principles of English justice" were applied, but it is clear that no technical significance can be attached to the phrase. The Rajah was an Englishman with an Englishman's moral standards and an Englishman's sense of justice and fair play, and his administration was based on those principles. To that extent English law was applied in Sarawak.

I have given this account of the principles and methods of the first Rajah because the government of Sarawak continued to be based upon those principles and methods for many years. Such Orders (as statutes are called in Sarawak) as were enacted were simple, and there was no attempt made to administer a scientific system of law. It was not, indeed, until 1928 that an officer with legal qualifications was appointed. In what follows a short account is given of the law and constitution of the State as they are to-day.

The Status of Sarawak.—The status of Sarawak as an independent State was finally recognized by Her Majesty's Government, though not without many vicissitudes. The history of the matter is too long to narrate here, but it may be noted that Sir James Brooke made several attempts to induce the British Government to take over the State, and even in 1841 he seems to have aimed at, or hoped for, British protection, though in what degree is not clear. The question of his own status was

raised in 1853, when a Commission was appointed to inquire into certain charges against him, but the only immediate result was that his resignation of his appointment of Governor of Labuan (which had been made in 1847) was accepted. The Rajah continued his efforts to obtain British protection, and when they failed he began negotiations with other powers, including Belgium and France, but these also were abortive. He was at length partially successful and in 1863 Sarawak was recognized by Her Majesty's Government as an independent State and a British Consul was appointed in 1864. It was not, however, until 1888 that the State became a British protectorate, and in that year the agreement was signed by which the present relations of Sarawak with His Majesty's Government are governed. For the purpose of this article the most important provision is Art. 1, which provides that Sarawak "shall continue to be governed and administered by the said Rajah Brooke and his successors as an independent State under the protection of Great Britain, but such protection shall confer no right in Her Majesty's Government to interfere with the internal administration of the State further than is herein provided." By other Articles the British Government reserve the right to decide any question of succession and to conduct the relations of Sarawak with foreign States. There is also a right to appoint British consular officers, and it is provided that British subjects, commerce and shipping shall have the advantages of the most favoured nation. No cession of the territory may be made to any foreign State without the consent of the British Government. It will be seen, therefore, that as far as internal administration is concerned the agreement concedes the claim of the Rajah to govern the country as an independent sovereign.

Constitution of Sarawak.—The Rajah is the supreme head of the State and the sole legislative authority, and Orders are enacted by him alone. He is ultimately also the sole authority for the expenditure of public money. He is advised by four bodies, namely: (1) The Supreme Council; (2) The Council Negri; (3) The Committee of Administration; (4) The Finance Committee.

1. *The Supreme Council.*—This body seems to have no statutory authority. It was inaugurated by Sir James Brooke in 1855, apparently on Lord Grey's advice, and from that date onwards it held meetings at irregular intervals of which minutes were taken and, in 1870 and after, published in the *Gazette*. The members are appointed by the Rajah, and at present there are two European members—the Government Secretary and the Treasurer—and five Malay members who are all resident in Kuching. The powers and duties of the Council are not defined, but it appears at one time to have had some legislative functions, as in earlier years an Order was sometimes enacted as an "Order in Supreme Council," and sometimes as an "Order by H.H. the Rajah," though there did not seem to be any clear distinction between the two. The Council does not now hold formal meetings, the last meeting of which minutes were taken being held in 1927. There are, however, what amount to informal meet-

ings, as on Mondays and Thursdays when the Rajah comes to his office he is met by the Government Secretary and a short conversation takes place with the Malay members of the Council, after which they withdraw and the Rajah conducts the business of the day with the Government Secretary. The Secretary for Native Affairs, who is not a member of the Council, is usually present at these meetings, but the other European member—the Treasurer—is not.

2. *The Council Negri*, "the Council of the Country," was established by the first Rajah, Sir James Brooke, in 1867. In a meeting held in that year regulations were drawn up of which the first was :

The purpose of the Council is to deliberate on any matter of great importance to the population in general in the countries under Sarawak rule, or should any difficulty arise among the different peoples about laws and customs, giving rise to hindrances and disputes ; the meeting of the members and majority of their voices may determine on one course in preference to another, and subsequently should their decision meet with the approval of the Rajah or his representative at the head of the Government, the said custom would become law, and be duly entered in the Minute Book.

The Council Negri consists at present of forty-seven members—nineteen Europeans and twenty-eight Malays. The Malay members are native chiefs and officers from all parts of the country, and the Europeans are the more senior officers of the Civil Service. There are no representatives of the public. The Council meets normally at intervals of three years, and since 1873 the business of the Council, except in 1918 when the present Rajah took the oath of accession, has consisted of an address by the Rajah which takes the form of a report and comment on important events in the history of the country since the last meeting. Though the actual business transacted is of little importance, the Council has considerable value in bringing together representatives from all parts of the country, who otherwise would seldom, if ever, meet. This aspect was referred to by the second Rajah at the meeting of the Council in 1889, and again at the meeting in 1897. The Rajah's speech to the Council in 1889 is thus reported : " It might be said, that such meetings were almost useless, as so few matters were discussed ; but he was not of that opinion ; he thought that if they failed to meet periodically they would soon forget each other. It was His Highness's view that each member, both those from the distant and near parts, both those of the coast and in the interior of the territory, might be said to bring a rope to him, as well as a head, and that the many ropes when thus bound together formed the strength of the Government, instead of relying on two or three only ; if they only met with their mouths shut it was better than not meeting at all." In 1900 he again mentioned the matter and referred to the " General Council, the principal use of which was to bring the members, European and native, together as friends and as officers of the Government, and to be ready to be assembled on any emergency."

3. *The Committee of Administration* was in being at least as early as

1874, its functions then being to carry on the government during the absence of the Rajah. It was reconstituted on a different basis in 1915 when, in addition to administering the government during the Rajah's absence, it was charged with certain advisory duties when he was in Sarawak. In 1921 the Committee fell into desuetude, and in 1924 it was abolished, but was again reconstituted in 1925. In its present form its powers and duties are defined by an Order of 1927, which is similar to the Order of 1925. The following are the chief points. The Committee is constituted "for the purpose of Administering the Government during the simultaneous absence of Their Highnesses the Rajah and the Tuan Muda from Sarawak and of acting in an advisory capacity at all other times." The members are appointed by the Rajah and include advisory members, two for Malay affairs and one for Chinese affairs. The senior ordinary member present is the Chairman. By s. 2 of the Order "an ordinary meeting of the Committee shall be held at least once in every month," and by s. 4 a quorum consists of five members of whom not less than three shall be ordinary members. The powers of the Committee are defined by s. 7 and include the following: (a) The Committee shall have power to deal with all matters of general administration; (b) all proposals involving new expenditure not already sanctioned in the year's estimates shall be submitted to the Committee for their consideration. The Committee shall be empowered to sanction additional expenditure on any vote up to 10 per cent. in excess of approved estimates but not exceeding that amount without reference to His Highness the Rajah; (c) the Committee has no power to enact or amend Statutes except when the Rajah and the Tuan Muda are absent from Sarawak, and then only when two-thirds of the members present who are entitled to vote consider that the matter is one of urgency. The Rajah must also be informed by telegram; (d) appointments made in the Civil Service are subject to the approval of the Rajah.

The Committee at present consists of nine European members who hold office *ex-officio*, and three advisory members, two Malays and one Chinese. After the Order of 1927 was enacted no meetings were held until 1933, when there were three statutory monthly meetings. In 1934 the Committee was revived and regular meetings are now held. Various matters are discussed and recommendations made which are submitted to the Rajah for his approval. During a recent absence of the Rajah from Sarawak the government was administered by the Committee, but on previous occasions subsequent to 1927 sometimes the Committee was appointed to administer the government and sometimes an officer of the Government was appointed by the Rajah.

4. *The Finance Committee* was first appointed by the Rajah in 1930 when financial problems became pressing, and in 1934 it was formally established by Order. It consists at present of four European members, and its functions are to advise the Rajah on all methods of raising revenue and on all proposals for the expenditure of the revenue of the State.

" All questions of financial policy must be considered by the Committee," and the annual estimates and various matters of detail, such as applications to transfer votes, must be laid before it. The duties of the Committee are advisory only and it has no power either to spend or to disallow the expenditure of money without the approval of the Rajah.

In addition to these four bodies there are two departmental Committees, the Promotions Board, which deals with the pay, leave, discipline, etc., of the subordinate service, and the Tenders Board, which deals with Government contracts.

There is no Legislative Council nor any body which is specifically charged with the duty of enacting or advising upon legislation and, as stated above, Orders are enacted by the Rajah alone. In practice, the draft of a proposed Order is prepared by a legal officer in collaboration with the department concerned. It may be sent round to other officers or departments interested and is now considered generally, though not usually in detail, by the Committee of Administration. It is referred to the Chief Justice before it is enacted.

Sources of the Law.—The formal source of all law is the Rajah. A short account of the material sources is given below.

1. *Written Law.*—This consists of Orders and Rules and Regulations made by the Rajah. In the early days Orders, as has been noted, were for the most part very simply drafted, and in 1922 a compilation of those then in operation was issued. This was known as the Green Order Book. The contents were thus described: " The following Government Orders have been selected as being the ones generally in use in Sarawak and consequently more often required for reference." In 1927 it was intended to publish a new Order Book containing all the Orders then in operation and repealing and re-enacting with amendments such of the Orders in the Green Book as were still in operation. A certain number of the old Orders were thus revised and were published in a loose-leaf binder (known as the Red Book), but a considerable number still remained. A new edition of the Green Book was published in 1933. It contains those of the earlier Orders which still survive, with the exception of certain orders and regulations relating to customs, excise, ports, and shipping which are published in a separate volume. The Green Book deals with a great variety of subjects. Some of the Orders republished are statutory, others are in the nature of rules or regulations, while others again are mere personal instructions as, owing to the fact that the Rajah is the source of all law, the distinction between statutory and other matters has not always been observed. Speaking generally, the Orders in the Green Book are very imperfect and usually deal only with the fringe of the subject. On the other hand, they are the only statutory authority on the matters with which they deal, and to redraft them so as to be an adequate statutory exposition of each subject would be an immense task. They are, however, gradually being redrafted as occasion requires.

The Red Book consists of the Orders published in 1927 and all new Orders enacted since. The Orders in this book are much more complete and deal more or less adequately with their subjects. A revised edition of the Red Book is now being prepared, and it is hoped it will be published in 1936.

In addition to these sources the following sources must be mentioned :

2. *English Law*.—By an Order enacted early in 1928, English law was applied to Sarawak "in so far as it is not modified by Orders and Enactments issued by His Highness the Rajah of Sarawak or with his authority and in so far as it is applicable having regard to native customs and local conditions." This is similar to the form in which English law has been applied in some Crown Colonies. It is necessarily vague and much has to be left to the courts, but in practice it provides a basis on which to found decisions.

3. *Indian Law*.—It appears that a practice arose of using the Indian Penal Code. At first this Code was used for guidance only, but gradually it came into general use, though it did not receive statutory authority until 1922. In 1934 it was adapted for use in Sarawak and was published as a separate volume.

4. *Common Law*.—One must in some cases presuppose a common law of Sarawak which exists *in gremio judicis*. There is, for instance, at the present moment no actual statutory authority for certain monopolies exercised by the Government.

Administrative and Financial System. *Executive Control*.—There is a Government Secretary, who is the executive officer responsible for carrying out the instructions of the Rajah and the Committee of Administration for the general administration of the country. The State is divided into four divisions, each of which is in charge of a Resident, and each division is subdivided into districts, each of which is in the charge of a District Officer. Some of the smaller stations are in the charge of an Assistant District Officer or cadet, and in others there is no resident European. There are also the various departments of Government, namely, Finance, Customs, Public Works, Medical, Post Office, Surveys, Land, Native Affairs, Chinese Affairs, Forests, Agriculture, and so on.

Finance.—Financial matters are considered by the Finance Committee, and the Treasurer is responsible for the administration of the department. Estimates are rendered annually by each department and are considered by the Finance Committee.

Legal System.—As noted above, a legal officer was appointed in 1928. In that year the new office of Judicial Commissioner was created, and this was the first time in the history of the state that an officer with legal qualifications had exercised a purely legal office. In 1930 the title was changed from Judicial Commissioner to Chief Justice, the duties of the office remaining the same. In 1929 a Legal Adviser was appointed and later in the same year an Assistant Legal Adviser. In 1933 the office of Assistant Legal Adviser was abolished and the legal staff at

present consists of the Chief Justice and the Legal Adviser, the latter of whom exercises various other legal offices, including those of Registrar of the Supreme Court, Official Assignee, and Registrar of Companies.

Judicial System. Magistrates' Courts.—The administrative officers are also magistrates and hold courts. The Resident's Court or court of a magistrate of the first-class has power to try all cases, subject in the case of a sentence of death and certain other sentences, to confirmation by the Supreme Court, and there are also second-, third-, and fourth-class Magistrates' Courts which have powers to give sentences up to two years, six months and two months respectively. These courts have also civil jurisdiction. There is an appeal from the lower courts to the Resident's Court and from the Resident's Court to the Supreme Court. The appeal from the court of a fourth-class magistrate is to the court of a second-class magistrate, and thence to the Resident's Court. It has been seen above that one of the earliest acts of the first Rajah was to establish a Court of Justice, but there is no record of a written Order on the subject until 1870. The constitution and powers of the courts as set up by this Order were considerably changed by an Order of 1922, and this was repealed and re-enacted with amendments in 1933. The courts are now governed by this Order and by the Code of Criminal Procedure which was enacted in 1932 and came into operation in August 1933. The Courts of Magistrates consist of the appropriate magistrate advised by one or more native magistrates, but there is a proviso that in cases where a native is not involved the court is duly constituted if the European magistrate sits alone. This modification of an old practice whereby the court was always "assisted by at least one native officer" was first introduced in the Order of 1933.

The Supreme Court.—By the Order of 1922 the Supreme Court consisted of two or more Supreme Court judges "assisted by at least two native members of the Supreme Council," the Supreme Court judges being senior civil servants with no legal qualifications. The position was unsatisfactory in practice and the Order was amended by a provision that the Court was constituted by the Judicial Commissioner (as he then was) sitting alone (as is done in North Borneo) with power to call assessors if required. The functions of the Supreme Court are to hear appeals from Residents' courts, to confirm sentences of death and sentences of over ten years' imprisonment, and it has power to revise the proceedings of the lower courts. In addition it has jurisdiction in matrimonial causes.

Native Courts.—These courts, over which a Malay magistrate presides, are concerned entirely with native matters, such as marriages by native custom, and other native questions. In addition to their work in native courts some Malay magistrates have been appointed third- or fourth-class magistrates and have therefore power to hold the court of their appropriate class. Disputes between Dyaks are sometimes settled according to Dyak custom by the Penghulu or Dyak Chief or by the Tuai Rumah or Head of the House, but sometimes such cases are brought before a European

magistrate, who also decides them according to Dyak custom. There are no statutory provisions on the subject. In 1911 a Chinese court, consisting of an honorary President and six honorary magistrates, was established by Order and a "handsome and substantial" courthouse was erected. This court sat for some time, but appears not to have been a success and it now no longer sits.

Procedure and Evidence.—In 1928, except for a few sections in the Courts Order dealing with appeals and a few simple rules relating to judgment summonses, there was no procedure prescribed by Order and no Code of civil or criminal procedure. There was no Order on Evidence. In 1932 a Code of Criminal Procedure was enacted and published, and it came into operation in August 1933. It is based on the Code of the Federated Malay States, which is itself based on the Indian Code, but the codes are not identical. The Sarawak Code consists of 400 sections and deals with most aspects of criminal procedure, including arrest, summonses and warrants, powers of the police to investigate, jurisdiction of courts, summary trials and trials with assessors, appeals, reference and revision, and various other matters. There is no provision for trial by jury, but in all cases where the punishment of death is authorized by law it is provided that the accused shall be tried with the aid of two or more assessors, "of whom at least half the number shall, if possible, be of the same nationality as the accused," and there is a discretion given to the Supreme Court and the Resident's Court to order that any case shall be tried with assessors. The opinion of the assessors is not binding on the court, which may, when there are two assessors, accept the opinion of one assessor, or where there are more than two, or at least two, and give judgment accordingly. In other cases, if the court disagrees with both assessors or, where there are more than two, if there are not at least two of the same opinion as the court, the magistrate may order a retrial or may submit the case to the Supreme Court, which may acquit or convict the accused or may order a retrial.

In addition to the right of appeal, the Supreme Court and the Resident's Court have powers of revision over all inferior courts and the District Court, *i.e.* the court of a second-class magistrate, has powers of revision over the court of a fourth-class magistrate. The revising court may call for and examine the proceedings of the lower court and may exercise any of the powers that could have been exercised on appeal. Thus *inter alia* it may: (a) uphold the conviction and maintain, reduce or increase the sentence; (b) quash the conviction and sentence and acquit or discharge the accused, or convict him of any offence of which the court below might have convicted him; (c) direct that further inquiry be made or order a new trial.

There is at present no Order on Evidence and no Code of Civil Procedure. Both these subjects present difficulty, and though guidance on many points would be useful, an elaborate system of procedure, with its pleadings and, in Sir James Brooke's words, "its multiplied forms, rules,

motions and technicalities," would be unworkable and would still be "a serious detriment and hindrance to justice" as, in the absence of professional lawyers, it would not be practicable to carry them out. This again is a problem of considerable difficulty, but on the whole at the present stage of legal development it would probably be undesirable to admit them.

Native Law and Custom.—In the Deed of 1841, which was confirmed in 1842, Sir James Brooke undertook that the laws and customs of the Malays "shall for ever be respected," and, in addition to Mohammedan law and custom, other native and Asiatic customs are administered in the courts where not inconsistent with fundamental principles. The Dyaks, in particular, have their own customs regarding marriage and other matters, and there are strict rules on the subject of incest which are enforced by the courts. The traditional Dyak method of living is in a long house which is occupied by many families, and the importance of preserving family relations thus becomes paramount. "Incest" in Dyak custom includes relationships which by English law would not even be a bar to marriage.

Marriage and Divorce.—A short account of the law on this subject may be of interest. In addition to marriage and divorce by native custom there is an Order dealing with what is ordinarily called Christian marriage, that is to say, marriage as understood by English law. This is not, however, limited to persons professing Christianity, and any two persons of different races and marriage customs who are otherwise competent to marry may contract such a marriage before a marriage registrar. The law of divorce dates from 1871, when an Order was enacted giving the Supreme Court power to dissolve civil marriages on proof of "adultery or harsh and unjust treatment." A comprehensive Order was enacted in 1932 which, with amendments added in 1933 and 1934, is now the basis of the law. The Supreme Court may grant divorces for a variety of reasons, including adultery, cruelty which causes substantial physical or mental suffering, desertion for two years, or failure to support the wife or children for six months, insanity for three years or more, imprisonment for five years or more, habitual drunkenness (including drug taking), wilful refusal to have sexual intercourse, and various others. There is also a provision giving the court a discretion to dissolve a marriage "on the ground that circumstances have arisen which make it reasonable and just," and there may be divorce by mutual consent if either the marriage was celebrated before a civil authority or if neither of the spouses professes Christianity. The fact that a petitioner has committed a matrimonial offence is not of itself a bar to divorce.

Jurisdiction is based upon domicile, but there are exceptions in the case of persons wholly or partly of Asiatic race if the husband has been habitually resident in Sarawak for two years or more, or on the petition of the wife if she is of a race indigenous to Sarawak, or would, but for her marriage, be domiciled in Sarawak, or being wholly or partly of Asiatic race if she has been habitually resident in Sarawak for two years or more.

Development since 1928.—Though the written law of the State still falls far short of a complete system, there has been a considerable development since 1928, when the first legal officer was appointed. The control which is now exercised over the proceedings of lower courts is in itself an important advance, as it co-ordinates to some extent the administration of the law. In addition to the Code of Criminal Procedure which contributes greatly to this co-ordination, there have also been enacted Orders on such technical legal subjects as administration of deceased persons' estates, bankruptcy, estate duties, interpretation, land, marriage, matrimonial causes, local government (municipal order) partnership and others. There is still room for considerable development, but it is important to remember that it would be unwise to make reforms too quickly, as they would be imperfectly digested, and would probably, therefore, result not in greater clarity, but in greater confusion. The ultimate object of legal development should not, however, be limited to establishing an adequate system of private law in the State. It should also include constitutional development, the aim of which should be, in particular, to strengthen and stabilize the authority and administration of the law.

ANSON ON THE CONSTITUTION.

[Contributed by EDWARD JENKS, ESQ., D.C.L.]

WHEN, after the lamented death of the late Sir William Anson, the Curators of the Clarendon Press were faced by the difficult task of choosing a new editor for his classical work,¹ it is not surprising that they approached that task with careful deliberation. For the new edition of Volume I, on Parliament, the oldest and, probably, the most popular of the original two volumes, they were fortunate enough to find in Mr. (now Sir Maurice) Gwyer, a most admirable editor, whose edition of 1922 (the fifth of that Volume) has been a treasure to several generations of students, officials, and all interested in the political institutions of the country. Equally fortunate were the Curators in their choice of a date of publication—just after the establishment of the Irish Free State had made important changes in the structure of both Houses of Parliament. Since that date (1922), there has been no change in the constitutional structure of Parliament, though the Franchise Act of 1928 may have had a substantial influence on its character. It is, in fact, almost a pity that Sir Maurice Gwyer added his last-minute prefatory note to the first decision on the *Rhondda Case*; for its subsequent reversal showed that Sir Maurice's attitude in the text was correct.

Presumably, Sir Maurice Gwyer's subsequently attained official position rendered it impossible for him to complete the task so admirably begun in 1922. But, again, the Curators have been fortunate in securing, as the editor of Volume II ("The Crown") of Sir William Anson's work,² Professor Berriedale Keith, well known to readers of this *Journal*, and indeed to the educated public at large, as one of our leading authorities on constitutional questions, notably in their Imperial aspects, and as an author who, like Sir William himself, has the double qualification for his task, of academic learning and official experience. It may be said at once that Professor Keith has fulfilled his arduous duty with complete success, and that, incidentally, he has earned the gratitude of his readers

¹ *The Law and Custom of the Constitution*. By (the late) Sir William R. Anson, Bart., D.C.L. Volume II. The Crown. Parts I and II. Fourth Edition. By A. Berriedale Keith, D.C.L., D.Litt. (Oxford, at The Clarendon Press, London: Humphrey Milford, Oxford University Press, 1935.) Pp. xxxi and xv + 325 and 378. 30s.

² One cannot help regretting that the forecast on the title page of the 1922 edition of Volume I has not been carried out in the volumes under review. There are, in fact, two volumes; but they appear as Parts I and II of Volume II.

by following the good example of Sir Maurice Gwyer in adding a Table of Cases to his prolegomena. Unhappily he has not, as his predecessor did, added an Index of Statutes.

It is not surprising to find that Professor Keith, in order to accomplish his task, has felt bound to add considerably to the bulk of the new edition. Not only are his pages more closely printed than those which came direct from his author, but there are many more of them. Sir William Anson increased his pages in 1907-8 from 476 to 594. Professor Keith has added more than 100; and, with allowance for the closer printing, over 65,000 words. Needless to say, the increase is mainly due to the rapid growth of the Executive side of the Constitution since 1908, and is largely justified by that growth. But we are not sure that the plan which he has adopted, of giving, as introduction or appendix to the chapters on such Government departments as the Dominions and Colonial Offices and the Ministry of Health, a rapid summary of the constitutions of the dependencies and English Local Government, is entirely sound. Professor Keith is, of course, an authority on the Imperial side of the Constitution; and whatever he writes about it is valuable. But a précis of the Dominion Constitutions in ten pages and of the intricate details of English local government institutions in fifteen, is apt to be rather indigestible food; and the space devoted to it might have been better occupied by a rather fuller treatment of such important administrative departments as the Ministries of Health, Agriculture and Fisheries, Education, Labour, Trade, and Transport, which receive somewhat cavalier treatment. Sir William Anson himself, who grouped such of these departments as existed in 1908 under the heading of "Regulative Offices," seems to have had a more restricted view of the boundaries of the Constitution; for he confined himself pretty closely to the central machinery, and its relations with the local authorities. But this criticism opens a wider question, upon which we propose to say a few words.

It has probably been remarked by many readers of Sir William Anson's work, that its title is curiously vague: "The Law and Custom of the Constitution." Upon this, the reader might fairly put the question: "*What* Constitution?" Personally, the writer (who had the privilege for some years of the acquaintance of Sir William Anson) declines to believe that the vagueness of this title was due either to indifference or to caution on the part of its author.

For Sir William Anson was not only the fine product of academic and official experience. He came of an ancestry which had long rendered, with great distinction, service in the public life of his country. More than that, he was the incarnation of the great Whig tradition of the eighteenth century; and so, for him, *the* Constitution was the Constitution of 1688, foreshadowed in the Bill of Rights and developed in the later years of Queen Anne and the reigns of the first two Georges. He was aware, of course, that this Constitution had a long history, stretching back into the Middle Ages; and, in his Preface to the first edition of the

work under review, he acknowledged its indebtedness to that history. But in the historical passages of that edition, the author's hand has not, perhaps, the sureness which marks it when he is dealing with the modern developments of his subject ; and the later historical researches of such scholars as Maitland, Tout, and Pollard have made some of his historical statements inadequate, if not actually questionable.

The truth appears to be that, since Sir William Anson planned his great work, both the government of England, and that of the Commonwealth of Nations which has sprung from her loins, have undergone great changes, which have made his plan almost impossible of compression into a book of moderate size. At the beginning of the present century, for example, in spite of the considerable degree of self-government which had been reached in the more important members of the Commonwealth, the Parliament at Westminster was still the real legislative organ of the whole Empire. Admittedly, in the case of the self-governing colonies, that organ functioned, to a large extent, indirectly, through the control exercised by Parliament over the Secretary of State for the Colonies, who himself controlled the colonial Governors in the exercise of the Royal Prerogative of granting or withholding consent to colonial legislation. But, in supremely important legislation, such as Constitution Acts, Naturalization Acts, and Merchant Shipping Acts, the Parliament at Westminster was the direct source of legislation affecting even the self-governing colonies ; while for the "Crown colonies" (as they were then called) and the Indian Empire, that Parliament was a direct source of legislation, save where, in the case of conquered or ceded colonies, the Crown still exercised its ancient prerogative of legislating by Order in Council. The Statute of Westminster has, of course, changed all this, at any rate so far as the Dominions in which it is in full force are concerned ; and, even though some years may elapse before the Dominions mentioned in s. 10 of that statute exercise their option to come under it, it is hard to believe that, either by virtue of that section or under the reservation contained in s. 4, much direct legislation in the affairs of the Dominions will in the future emanate from the Parliament at Westminster, while the indirect legislative influence of that body has practically ceased with the recent change in the status of the Governors-General.

In the second place, when Sir William Anson published the first edition of "The Crown," in 1892, the organization of the Executive was far simpler and less comprehensive than it is now. If we except the Board of Trade, which has both lost and gained jurisdiction since 1892, the only "Regulative" Offices of importance at that date were the Local Government Board, the Board of Agriculture, and the Board (or, as it was then called, the Committee of Council) of Education ; and of these the title of "Regulative" given to them by Sir William rightly indicated the general character. Since that date we have seen the creation of the Ministries of Health, Labour, and Transport, as well as the new Secretaryships of State for the Dominions, Air, and Scotland ; and, not less

important, a profound change in the kind of work that a Government department may be called upon to do. No longer merely "regulative," these new Ministries have administrative responsibilities which involve the expenditure of huge sums of public money, and the decision of questions of policy which affect the welfare and social progress of millions of English people. These responsibilities cannot be adequately explained in a few brief paragraphs forming part of a description of the constitutional position of the department in question; it is not surprising, for example, that the vast schemes of "housing" which have changed the face of England within the last fifteen years under the ægis of the Minister of Health, should, apparently, be dealt with in Professor Keith's new edition only in relation to purely incidental questions raised by them with regard to Orders in Council and the jurisdiction of the courts. It would have been impossible to deal with them in their natural place, viz., under the Ministry of Health, without a change of plan.

Professor Keith has, we think, himself realized that the work which he has so learnedly edited is, in another important respect, incomplete. Sir William Anson's original plan included a chapter, or, rather, a part of a chapter, on the important topic of "The Crown and the Subject"; but it can hardly, on the most modest estimate, be considered adequate. It contains, for example, no discussion of the vital questions of the extent of such civic rights as freedom of movement, speech, writing, association, and public meeting—matters which, in a democratic Constitution, go to the very roots of the system. It is possible that Sir William Anson had been influenced, to some extent, by the brilliant contemporary work of his colleague Dicey, whose stimulating *Introduction to the Study of the Law of the Constitution*, as its name implies, was less a systematic survey of the Constitution as a whole, than an endeavour to describe its general character. In this endeavour it was strikingly successful; but, as often in works of striking originality, the brilliance of some of its contents threw others into the shade, and its author's view that the rights of citizenship did not, in England, derive from the Constitution, but were implicit in and presupposed by it, rather tended, in the minds of his readers, to obscure their importance. Consequently, we are not surprised that Professor Keith, in *his* chapter on "The Crown and the Subject," has added some thirty pages of description of the actual extent of, and the methods of enforcing, these civic rights. We could, indeed, wish that the limits of his space had not compelled him to a compression which sometimes tends to obscurity;¹ but there is no doubt that his additions to this part of Anson's work add greatly to its value.

It would seem, therefore, as though, if Sir William Anson's classical work is to remain the standard textbook of its class, there will have to be

¹ For example, Professor Keith says (Pt. I, p. 325): "All aliens not part of invading forces owe allegiance, local as opposed to natural, to the sovereign." Surely this is only true of aliens resident in the sovereign's territory? No authority is given for the statement.

considerable changes in its plan. Volume I is, in its way, perfect, or, at any rate, needs only slight modifications in its historical passages to keep abreast of modern research. But with that part of the work which is the subject of this review, the case is different. In future editions of that part we shall hope to see a good deal which does not appear in the present ; and, if that hope is realized, it is fairly certain that a good deal which is attempted in the present edition will have to disappear. What are the natural lines upon which such a change might proceed ?

Insomuch as the Crown is the one institution which functions regularly and effectively throughout the Empire, it would appear that the kernel of any work which professes to give an account of its working must comprise at least an effort to enumerate and explain those operations of the governmental system which are based directly on the Royal Prerogative ; for this is the oldest and, perhaps, still the most important aspect of the Crown. It includes, for example, all relationships between the King and his Councils, his Ministers, and his diplomatic, judicial, and governmental representatives ; it includes also the powers which they, in their respective offices, exercise in their capacity of representatives of the Crown, as distinguished from powers which may from time to time be conferred on them by Act of Parliament. These latter are really a part, not of Constitutional but of Administrative Law ; and their omission would leave room for a fuller description of the constitutional powers of such Ministers as the Secretaries of State and the Lords of the Treasury, the treatment of whose offices (for example, that of the Secretary for the Dominions) is necessarily restricted, for reasons of space, to very narrow limits in the present arrangement.

A similar suggestion might also be made with regard to a description of those institutions which, whether directly created by Act of Parliament or not, in fact work entirely independently of the direct authority of the Crown—such, to take two notable examples, as the Constitutions of the Dominions and the organs of local government throughout the Empire. In view of the intricacy and variety of these institutions, it is, obviously, impossible, within the limits of a single textbook, to give more than the baldest summary of them—a process which, exiguous as it is, tends to exclude matter more essential to an understanding of the Constitution. They are affairs chiefly of local interest, while matters such as, for example, the powers of Dominion Ministers as representing the Crown, raise fundamental questions of constitutional law which hardly, owing to the exigencies of the existing plan, receive the attention they deserve. A similar remark applies, with almost greater force, to the position of the Dominions as members of the League of Nations and its organs, and to the vitally important subject of the relationships *inter se* of the different members of the Commonwealth. On some of these subjects, if not all, Professor Keith has made some useful contributions to the new edition ; but he has obviously been embarrassed by the necessity of keeping his two volumes within reasonable bounds.

Finally, within the last few years, the international functions of the Crown have undergone a profound modification by reason of the inclusion of Great Britain (as well as all the Dominions save one) in the League of Nations, and the acceptance of obligations and the acquisition of rights resulting therefrom. Allusion has already been made to the membership of the Dominions in the League ; but, if only by reason of its geographical position, the inclusion of Great Britain is likely, in the not remote future, to entail even more far-reaching changes. For good or for ill, the conception of sovereignty bequeathed by Grotius to the world has been profoundly modified by the creation of the League, though the word "sovereignty" is still constantly appealed to as a touchstone of right and duty. Surely, in a standard, if elementary, work on the Crown, at least the leading articles of the Covenant which the Crown has solemnly undertaken to support should be summarized, and their effect on the exercise of the Prerogative explained. For one thing, the relationship of the Mandated Territories to the Crown, with which Professor Keith deals in some detail, is almost unintelligible to a student unacquainted, at least in outline, with the terms of the Covenant. For another, it is quite clear that the old view that the Crown, in its international relations, acts independently of Parliament, already profoundly modified by the development of the Cabinet System, has almost ceased to be tenable at all since the creation of a Ministry for League of Nations affairs.

The changes suggested in this article would, in the view of the writer, not only effect a needed rearrangement of a valuable work, and thus, possibly, prolong its life for a considerable time. They might also have the very desirable result of clearing up a subject on which a good deal of soreness, emotional rather than rational, exists at present. The Cabinet System, perhaps the most original contribution of British genius to practical politics, was an attempt to solve the age-old rivalry between the Crown and the Parliament, which had already plunged the country into civil war. What may be called "paper solutions" of the problem raised by this rivalry proved to be failures ; the English do not respond to the attractions of draftsmanship (for which they have singularly little aptitude). By historical accident, rather than by any assertion of principle, the statutes of the Parliament at Westminster had come to be regarded as the supreme expression of the will of the State ; and this seemed reasonable, inasmuch as these statutes were, both in theory and practice, the joint production of the two greatest powers in the State, the Crown and the Parliament. But circumstances caused a change in the balance of power. The race of monarchs which could claim the ancient sanction of hereditary right was replaced, twice within half a century, by successors who, beyond all question, owed their thrones to the gift of Parliament. As a natural consequence, the initiative in shaping the policy of the realm passed from Crown to Parliament ; and, in particular, the share of the Crown in Parliamentary legislation dwindled to a shadow. Despite the obstinate

revolt of King George III, the Parliament (after 1832 the House of Commons) ruled the country through the King's Ministers.

Again, however, there came a change, the causes of which it is not easy to analyse. Despite the broadening of the franchise, and with no perceptible lowering of the standard of intelligence in the private member of Parliament, the latter body seemed to lose its grip of current affairs, and to accept, more and more completely, the initiative, not, of course, of the monarch in person, but of his Ministers, who now, reversing the former position, began to govern the country through the House of Commons. Perhaps the change is part of the process of specialization which has made such rapid strides in all the pursuits of life ; for the Minister, though he may know little about the subject of his own department, is a specialist—in politics, while the private member of Parliament is a layman. Perhaps the increasing opportunities and interests of modern life have destroyed the glamour which used to make ambitious men anxious to become members of the House of Commons. At any rate it seems fairly clear that the popular interest in Parliament is, except in moments of crisis, less than it was ; though the ultimate authority of Parliament is still unquestioned, save by a negligible minority of the community.

Still, if the causes of this change are mysterious, the results of them are not obscure. Ever since the broadening of the franchise made questions of social reform more and more urgent, measures for furthering their solution have come to play a larger and larger part in political programmes, and to occupy more and more of the time of the House of Commons. But these measures, by reason of the complexity and gravity of the problems with which they deal, are necessarily complicated and obscure. Moreover, the questions which they raise are rarely questions of principle ; more often they are questions of discretion, requiring much technical and local knowledge. In other words, they are questions for experts ; and one of the great merits of the House of Commons is that it is not, to any considerable extent, a body of experts. Not unnaturally, Parliament, feeling itself helpless to supervise and administer these complicated measures, has entrusted the execution of them to new Ministries, which may almost be termed " non-political " ; though at present the distinction between them and the older type of executive office is not official. The existence of these Ministries is, of course, a constitutional fact ; and that fact, with its constitutional consequences, must, doubtless, find a place in any standard book on the Constitution. But, quite apart from questions of bureaucratic despotism, it might tend to allay heart-burnings, and induce a calmer atmosphere, if the powers of these newer Ministries, and the methods by which they are wielded, were removed from the dignified pages of works on the Constitution, and relegated to the humbler, more prosaic, and less " political " atmosphere of works on Administrative Law.

MENS REA IN GERMAN AND ENGLISH CRIMINAL LAW—III.

[Contributed by PROFESSOR HERMANN MANNHEIM.]¹

PART II. THE ENGLISH LAW.²

General Features.—In English Criminal Law, there are to be found the same fundamental principles as in German law : as a rule, no punishment without guilty mind, but criminal guilt is not identical with moral guilt. "The question of moral blameworthiness is outside the range of discussion."³ Moreover, both in English and in German Criminal Law it is, generally, not important whether the statute in question mentions *expressis verbis* the species of mens rea which is required for punishment.⁴ In English law, too, it is quite possible that the same statute may require different species of mens rea as to its particular "Tatbestandsmerkmale" (parts of the "Tatbestand").⁵

On the other hand, the evident differences between the two legal systems are : (a) that English law, in its conception of mens rea, places more emphasis upon the element of *knowledge*, upon the ideas of *probability* and of *danger* than upon the element of *will* ; (b) that the principle of *Versari in re illicita* plays a greater part and is able to cause greater enhancements of punishment in English law than it does in German law ; (c) that English law *does not differentiate so strongly* between intent, malice and negligence, as German law differentiates between Absicht, Vorsatz and Fahrlässigkeit.

The second and the third statements are more or less corollaries of the first. In addition to these most essential divergences there are, of course, numerous deviations in details and these will be discussed later.

¹ The author wishes to express his gratitude to Mr. D. Seaborne Davies, London School of Economics and Political Science, for kindly reading the manuscript and making several valuable suggestions.

² There is hardly need for emphasizing that the following brief remarks are not designed to give a complete account of the English doctrine of Mens Rea. They are intended only to bring strongly into the foreground a few important points of comparison.

³ Douglas Aikenhaide Stroud, *Mens Rea or Imputability under the Law of England* (London 1914), pp. 9 *et seq.*

⁴ Stroud, *op. cit.*, p. 31 ; Kenny, *Outlines*, 14 ed., 1933, pp. 48-9.

⁵ According to Stroud, p. 36, the main difficulty in the famous case *Reg. v. Prince* had been rooted here, in so far as the statute in question required intention only as to the abducted girl's parentage, not as to her age. See further Stroud, p. 48, and Kenny, p. 41.

It may be useful now to draw a parallel between the particular species of *mens rea*.

Intention.—The German “*Absicht*” may be compared with the English “intention” or “intent,” at least in so far as there is a partial equality of the problems. In English law, too, intention is required only in certain statutes.¹ Its contents, however, are much wider than those of the “*Absicht*.” The widest conception is used by Austin, who distinguishes between three kinds of intention.² As an instance of the first kind he gives the quite unambiguous test-case which is also chosen in the first part of this essay under No. 1.³ In this case, immediate purpose and ultimate purpose are identical. Austin’s second example corresponds to the second case which is characterized above as *dolus directus*:⁴ “You shoot me, that you may take my purse. . . . I defend my purse to the best of my ability. And, in order that you may remove the obstacle which my resistance opposes to your purpose, you pull out a pistol and shoot me dead. Now here you intend my death, and you also desire it as a means, and not as an *end*. . . . Your ultimate motive is your desire for my purse. And if I would deliver my purse, you would not shoot me.” This case is a matter of opinion in German Criminal Law. As above mentioned, it might often be covered by the conception of “*Absicht*.” It is the difficulty of such cases that, on the one hand, the intention—as Austin and several other English writers rightly emphasize⁵—need not be referred to the ultimate purpose. On the other hand, however, it is repugnant to us—as Clark⁶ and Kenny⁷ feel—to call undesired results “intended.” It is, therefore, necessary to make some differentiation among the results which are not ultimately intended, separating those which are welcome from those which must merely be taken into the bargain. Only welcome results can be called “intended.”

With greater distinctness than in Austin’s second example, the contrast between his idea of “intention” and the German “*Absicht*” is manifested in his third case:⁸ “You shoot at Sempronius or Styles. . . .

¹ See Stephen, *Comment.* iv, 19 ed., p. 11; Stephen, *History Engl. Crim. Law*, vol. ii, p. 112; Kenny, *Outlines*, pp. 43, 135 *et seq.* (malice aforethought in case of murder), 147 (felonious wounding), 179 (burglary), 213 (larceny), etc.

² Austin, *Lectures on Jurisprudence*, 4 ed., 1873, vol. i, pp. 436–7.

³ *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. i, p. 87.

⁴ *Ibid.*, p. 91.

⁵ See Mercier, *Criminal Responsibility*, p. 50; Salmond, *Jurisprudence*, 8 ed. 1930, p. 398.

Besides, the tenet: “The end justifies the means” holds in English law just as little as in German. In German Criminal Law this question is usually considered in connexion with the doctrine of unlawfulness (“*Rechtswidrigkeit*”), not with the doctrine of *mens rea*; therefore, it has not been dealt with in the first part of this essay. As to English law see Stroud, p. 9, who quotes the following dictum of Cockburn C.J. in *Reg. v. Hicklin* (L.R. 3 Q.B. 371): “I think the old and honest maxim that you shall not do evil that good may come, is applicable in law as well as in morals.”

⁶ *Analysis of Criminal Liability*, 1880, p. 78.

⁷ *Outlines*, p. 150.

⁸ *Lectures*, i, p. 436.

But when you shoot at Styles, I am talking with him, and am standing close by him. And . . . you think it not unlikely that you may kill me in your attempt to kill him. You fire and kill me accordingly. Now here you intend my death, without desiring it . . . since you contemplate my death as a probable consequence of your act, you intend my death although you desire it not." If the facts of this case are to be understood, as Stroud ¹ seems to understand them, the form of mens rea which may be applicable in German law, would be *dolus directus*. But—and such an interpretation seems also to be possible in conformity with the account given by Austin—had the actor believed the death of the man standing between him and his intended victim to be only possible, not certain, then the case would be one of *dolus eventualis* or merely of negligence. In any case, German law would not support Austin's dicta: "To expect any . . . consequences, is to intend those consequences"; ² "an intended consequence is not always desired"; ³ "to intend is to believe that a given consequence will follow a given act." ⁴

Austin, since he makes expectation the cardinal point of intention, is able to distinguish between intention and mere rashness according to the probability of this expectation.⁵ In German law, however, even when the "Wahrscheinlichkeit" is taken as a basis, the degree of probability is important only for the differentiation between *dolus eventualis* and conscious negligence, not for the definition of "Absicht." Salmond also acknowledges that the degree of probability is unimportant in this connexion, and he uses the following formulation:⁶ "True intention is the foresight of a desired issue, however improbable—not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man a mile away, I may know perfectly well that the chance of hitting him is not one in a thousand; I may fully expect to miss him; nevertheless I intend to hit him if I desire to do so."

As Turner says, English jurists have not followed Austin in his wide definition of intention.⁷ He regrets, nevertheless, that this definition has not been adhered to also as to undesired results. Stephen ⁸ associates a narrower meaning with the conception "intention"; he defines it as follows: "It is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition." He opposes the confusion of intention with motive or ultimate purpose; for, he says, the same intention of killing can be based upon changing motives: "For instance, it will often be argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him

¹ P. 4: ". . . yet the harm to B is intended even more fully than C's death, which is more remotely expected because the bullet may be stopped by B's body, or directed from its course, and so not reach C who is farther away." Stroud, apparently, assumes that A was not able to reach C at all, without injuring B.

² *Lectures*, i, p. 433.

³ p. 434.

⁴ p. 438.

⁵ *Lectures*, i, pp. 441, *et seq.*

⁶ *Jurisprudence*, p. 394.

⁷ I. W. Turner, *Mens Rea and Motorists* (Cambridge Law Journal, vol. v, 1933, pp. 63 *et seq.*)

⁸ *History*, ii, p. 110.

grievous bodily harm, because his intention was not to hurt the policeman, but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence; but, if the difference between motive and intention were properly understood, it would be seen that when a man stabs a police constable in order to escape, the wish to resist lawful apprehension is the motive, and stabbing the policeman the intention, and nothing can be more illogical than to argue that a man did not entertain a given intention because he had a motive for entertaining it. The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort." It is just this latter example which shows the parallelism of the problems in a striking manner. In English law, too, the difficulty mentioned by Stephen arose mainly because the statute in question combined the conception of intention with a result which consisted exclusively in the damaging of another person.¹ The statute, therefore, has been altered in such a way that the actor's intention has to refer only to the aiding of the actor, viz. to the making possible his escape.

Stroud differentiates between intent, intentionality and intention, intentionality being the widest of these three conceptions: ² ". . . all forms of true intentionality . . . may be regarded as falling under three classes: full intention, imperfect intention (or uncertainty) and inadvertence. Full intention is usually signified in English law by the word intent. . . . Imperfect intention, or uncertainty, includes all intermediate states of mind between full intention and sheer inadvertence. The line of division between full intent and imperfect intention corresponds with the line between probability and improbability, as appearing to the person acting." Hence it follows that the conception "full intention" (= intent) covers the German conception "Absicht" as well as *dolus directus*; the conception "imperfect intention" (or uncertainty) includes the sphere of the "acting in a state of uncertainty," i.e. *dolus eventualis* and conscious negligence, whilst "inadvertence" covers unconscious negligence. This is nothing else than the tripartition proposed by Löffler (see Part I, p. 97).

Malice.—Which form of mens rea, known to English Criminal Law, corresponds most nearly to the German "Vorsatz," and, especially, in what relation to the latter stands the conception "malice"?

It is necessary to differentiate malice according to the Common Law and malice according to statutory law: ³ in Common Law "malice" means a general condition of wickedness ⁴; in statutory law, however, "malice" means the specific mens rea essential to the special class of

¹ See my remarks in the first part of this essay, *Journ. Comp. Leg.*, Third Series, vol. xvii, p. 89.

² *Op. cit.*, pp. 5-6.

³ Kenny, *op. cit.*, pp. 149 and 166.

⁴ See Rollin M. Perkins, *A Re-Examination of Malice Aforethought* (Yale Law Journal, vol. xliii, February, 1934, p. 537): "Hatred, grudge, illwill, or spite."

crime. Malice, in statutory law, therefore, has this in common with the German "Vorsatz" that its significance depends upon the crime in question. Thus, the "Vorsatz" of wounding a person is not identical with the "Vorsatz" of damaging the property of another; and, in English law, the same differentiation is made with regard to the conception of malice.¹ Professor Sayre² has given a detailed and very interesting exposition of the "growing particularization of the mens rea with respect to specific felonies," and arrived at the conclusion that the old conception of mens rea must be replaced by the new conception of "mentes reae."

The differences between malice and Vorsatz are, apparently, the following: (a) The borderline between malice and intent can be drawn with even greater difficulty than the borderline between Vorsatz and Absicht. (b) The spheres of malice and negligence are less distinctly separated than are, at least theoretically, the spheres of Vorsatz and Fahrlässigkeit. (That this demarcation is a very delicate one for the practice of the German criminal courts, has been emphasized above.) The differentiation is based, in English law, chiefly upon the degree of probability and danger; it is, therefore, a difference of quantity, whilst the German differentiation between Vorsatz and Fahrlässigkeit, at least theoretically, is a difference of quality. Actions committed maliciously are sometimes, in English law, covered by the same legal conception as actions due to negligence; both murder and manslaughter, *e.g.*, can be committed with malice as well as negligently. (c) English Criminal Law is less averse to the application of presumptions of *dolus* than is German Criminal Law.

English law avails (or availed) itself of the following presumptions: ³ "that a man intends the natural consequences of his own acts; that every sane man knows the law; that a man is sane until the contrary is proved; and that a woman under coverture, when committing a larceny in her husband's presence, acts under his coercion."⁴ The third presumption is unknown to German Criminal Law, but, nevertheless, has sometimes been followed by the lower courts with the formulation that the prisoner had been convicted "because his insanity is not sufficiently proved." (According to German law, the prisoner can be convicted only when his sanity has been proved.)

In this connexion, it may be advisable to add a few more words on a problem which has just recently aroused much interest in England on

¹ Kenny, *op. cit.*, p. 149; Stallybrass, *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. i, p. 46; *Reg. v. Pembliton*, (1874) 2 C.C.R., 119.

² Francis Bowes Sayre, "Mens Rea," *Harvard Law Review*, vol. xlv, pp. 994 *et seq.*, 1026, and *Harvard Legal Essays*, 1934, pp. 399 *et seq.*

According to Holdsworth, *History*, vol. viii, p. 434, Marowe as early as 1503 had recognized that "the guilty intent required for murder was different from that required for larceny." See, further, Potter, *Historical Introduction to English Law*, 1932, p. 308.

³ See Stroud, p. 12.

⁴ But as to this see now Criminal Justice Act, 1925, s. 47.

account of the Woolmington case and which has hitherto been only slightly touched upon in this essay: *i.e.* the presumption of innocence. English and American writers of to-day are in agreement on the fact that the position of Continental law as regards this problem is often misunderstood.¹ In fact, in Continental, and especially in German Criminal Law, the presumption of innocence is valid to no less a degree than in English law. The misunderstandings may be caused partly by the fact that the Continental law of Criminal Procedure is in many other respects less favourable to the prisoner than is English law.

The second presumption (that every sane man knows the law) was dealt with when the German doctrine of mistake was discussed. I will therefore now examine the first presumption mentioned by Stroud. In the formulation: "everybody must foresee the necessary consequences of his actions" it, approximately, corresponds to German law. But this is not so if the word "necessary" is replaced by the word "natural."² Salmond even opposes the formulation: "A person is presumed in law to intend the natural or necessary results of his actions," arguing: "This is much too wide a statement, for, if true, it would eliminate from the law the distinction between intentional and negligent wrongdoing, merging all negligence in constructive wrongful intent. A statement much nearer the truth is that the criminal law treats as intentional all consequences due to that form of negligence which is distinguished as recklessness—all consequences, that is to say, which the actor foresees as the probable results of his wrongful act . . . *Magna culpa dolus est.*"³ This last-mentioned tenet is not in force in German Criminal Law.

Versanti in re illicita imputantur omnia.—The most important sequel to the preference given in English law to the idea of probability and danger is the significance which the principle of *versanti in re illicita* has acquired. The origin of the principle is the same as in German law. Bracton, who borrowed it from Bernardus Papiensis, introduced it into English law.⁴ The famous fowl test-case of Coke, 3 Inst. 56, who cites (according to Stephen,⁵ without sufficient reason) Bracton as a precedent, has obviously very deeply influenced the following centuries. But in 1697 Holt C.J. endeavoured to limit the dictum of Coke that it must be held murder if a man shoots a fowl in order to steal it, and thereby accidentally kills a person: "There must be a design of mischief to the person, or to commit a felony, or great riot."⁶ This limitation, it is

¹ See, *e.g.*, Allen, *Legal Duties*, p. 253; A. C. Wright, 44 L.Q.R., 324; Ploscowe, 48 *Harvard Law Review*, 436.

² Stephen J. in *Reg. v. Doherty*, 16 Cox 306: "The general rule as to intention is that a man intends the natural consequences of his act." See furthermore Stephen, *Comment* iv, 19 ed. 1928, p. 11. In *Reg. v. Horsey*, Bramwell B. says: "the natural or probable result of his own act" (see Clark, *Analysis*, p. 54).

³ *Jurisprudence*, pp. 396-7.

⁴ Pollock-Maitland, *History*, vol. ii (1895), p. 475, fn. 4; Stephen, *History*, vol. iii, p. 32.

⁵ *History*, vol. iii, p. 56

⁶ Holt in *R. v. Keate* (see Stroud, p. 173 and Turner, *op. cit.*, p. 69.)

true, was not very important at first, because at that time most crimes, even thefts, belonged to the category "felony."¹ On the other hand, almost all felonies, except petty larceny, were in any case punished with death; the applicability of the doctrine of *versanti in re illicita*, therefore, was not able to cause an aggravation of punishment.²

Sir James F. Stephen confessed³ that he had, at first, followed the "astonishing doctrine" of Coke in his own judicial practice. But, in *Reg. v. Serné*⁴ he rejected this doctrine and the requirement that a felony must be committed: "I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder." That is an indication of a change frequently undergone by the doctrine of *versanti in re illicita*.

For the rest, the position of English law seems to be as follows: in principle, the courts adhere to the aforesaid doctrine, but in detail they make very important attenuations aiming at the enforcement of the ideas of probability and danger. This aim has been achieved by applying the doctrine of *versanti in re illicita* only to such crimes as have a tendency towards endangering a person's life, as, for instance, wounding, arson, rape, but not theft, damage to property, etc.⁵ Since in English law there is no such crime as the German "Körperverletzung mit tödlichem Ausgange," the making responsible for the serious result, in cases of killing, constitutes murder or manslaughter.⁶

I proceed now to quote some of the most important decisions: In *Reg. v. Faulkner*:⁷ "a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match, held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a conflagration ensued, which destroyed the vessel. It was held *per curiam* that a conviction for arson of the ship could not be upheld." Thus, the prisoner, having been sentenced in the first instance to seven years penal servitude, under 24 & 25 Vict. c. 97 s. 42 was acquitted by the Court of Crown Cases Reserved, since burning due to negligence is not punishable in English Criminal Law. One of the judges, Fitzgerald B. said: "I must take this not to have been the particular malicious intent

¹ Kenny, *op. cit.*, pp. 94, 221.

² Stephen, *History*, iii, p. 75. As to Foster see Holdsworth, *History*, viii, p. 436; Stephen, *History* iii, p. 75; Clark, *Analysis*, p. 53; Stroud, p. 176; Kenny, p. 139; Perkins, *loc. cit.*, p. 559.

³ *History* iii, p. 57.

⁴ (1887) 16 Cox 311.

⁵ Stroud, p. 172, quoting *Reg. v. Faulkner*, *Reg. v. Pembilton*, etc., says that the doctrine of constructive crime has never been applied to crimes other than murder and manslaughter. See also recent remarks by Dr. Roland Burrows, in 51 L.Q.R. at p. 45.

⁶ See Kenny, pp. 135 *et seq.*

⁷ (1877) 13 Cox 550.

of burning the vessel, but the particular felonious intent which is an element of larceny." ¹ If a terminology may be used corresponding to that of the German "Erfolgsdelikte," there is, in English law, no theft with the result of arson. Moreover, as the case *Reg. v. Franklin*,² shows, there is, in English law, no damage to property with fatal result: "The prisoner took up a good-sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased who was at that moment swimming underneath, and so caused his death." Field J. said: "It seems to me that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have a great abhorrence of constructive crime." The jury convicted of manslaughter, but only in the sense of homicide due to negligence. The punishment was lenient: only two months' imprisonment. Stroud is emphatic³ that it is quite clear from *Reg. v. Franklin* that "there is no constructive manslaughter where the act done is unlawful merely in the sense of amounting to a civil injury."⁴ That is a point which often seems to be overlooked by Continental jurists.

It is quite otherwise in those crimes which contain the element of endangering life or health. Here the problem seems to be mainly that of finding out what degree of dangerousness is, *in abstracto*, necessary for the "Grunddelikt"; furthermore, whether dangerousness of the "Grunddelikt" *in abstracto* is sufficient, or whether it must also be required that the particular action is dangerous in itself. As to these questions there is, apparently, no agreement. Some authoritative passages may be quoted: Stephen J. in *Reg. v. Serné* required dangerousness of the "Grunddelikt" *in concreto* (see the quotation given above). Avory J., however, in *R. v. Betts and Ridley*,⁵ a case of robbery, said with regard to the first judge's summing-up: "So here, the jury might have been directed that if Betts, while in the act of committing a felonious act of violence against the person . . . caused death by some act done by him in the course of that felonious act of violence, then he was guilty of murder. The jury, in fact, in this case were not directed strictly on those lines, but were directed on lines much more favourable to the accused, for they were told that if they thought with regard to the violence used by Betts that he did an act which was calculated in the judgment of ordinary people to cause death, and in this way caused the death, then they might properly find him guilty of murder. . . ." Here, Avory J. required only "a felonious act of violence against the person," without taking into account the question whether this act in its

¹ See, further, the similar case *Reg. v. Harris*, (1882) 15 Cox 75, which was to be decided under 24 & 25 Vict. c. 97 s. 7.

² (1883) 15 Cox 163. See also *R. v. Baldassare*, 22 Crim. App. R. 70.

³ P. 176.

⁴ The question whether a mere civil tort is a sufficient basis is one of the main problems of the famous case *Reg. v. Prince*, (1875) 2 C.C.R. 154; cf. Kenny, p. 41 and Sayre, p. 1025.

⁵ (1930) 29 Cox 259.

particular performance had included an element of danger for life or health. On the other hand, in *Reg. v. Handley*,¹ a case of infanticide, the court said that a woman is "guilty of murder if, without intending murder, she resolved to conceal the birth of the child by methods which will probably end in its death, and which being carried out do end in its death," but, the court added, it is only manslaughter when "she determines to be alone at the birth, for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence."

In the case *R. v. Hayward*,² there is a very unusual development of events. The prisoner had threatened and run in pursuit of his wife; when, in her flight, she fell down, he kicked her on the left arm, and when she was picked up, she was dead. "The medical evidence showed that the bruise on her arm, due to the kick, could not have been the cause of death. . . . She was suffering from a persistent thymus gland . . . lying at the base of the heart. Such a state of affairs was proved to be quite abnormal at the deceased's age . . . any combination of physical exertion and fright or strong emotion might occasion death in such a fashion." Here, Ridley J. did not speak of murder, but only of manslaughter, which latter, he declared, did not depend upon the fact whether the prisoner had been aware of his wife's fragile state of health. The punishment, for the manslaughter, was very lenient: three months' imprisonment with hard labour. According to the German Criminal Code, in a case of conviction for "Körperverletzung mit tödlichem Ausgange" (§ 226 StGB), the minimum punishment is three years' imprisonment, and only if the court should find some extenuating circumstances ("mildernde Umstände"), is it reduced to three months imprisonment (§ 228 StGB). Therefore, one must not fall into the error—misled, perhaps, by the terminology of English law, which uses the expression "manslaughter" instead of the German "Körperverletzung mit tödlichem Ausgange"—that, in such cases, punishment must always be severer in English than in German law.³

Abortion with fatal result was held to be murder till the middle of the nineteenth century; in later years, however, a differentiation was made: in *Reg. v. Whitmarsh*,⁴ Bigham J. told the jury: "if they should be of opinion that the prisoner could not, as a reasonable man, have expected death to result, they might find a verdict of manslaughter." To the same effect Avory J. in *R. v. Lumley*.⁵ Stroud has gathered from these and other decisions that the doctrine of constructive murder has now become discredited and obsolete. "A somewhat slighter degree of recklessness to human life," he adds, "may possibly suffice to

¹ (1874) 13 Cox 79.

² (1908) 21 Cox 692.

³ It is true that if we accept the point of view maintained by the writers who require the "adequate causation" with regard to the "Erfolgsdelikte," *R. v. Hayward* would not be a case of § 226 at all, but only of § 223 or of § 223a.

⁴ (1898) 62 J.P. 711. See Stroud, pp. 180 *et seq.*; Kenny, p. 140; Perkins, p. 560.

⁵ (1912) 22 Cox 635.

constitute *mens rea* in the case of an act *per se* criminal than would suffice in the case of innocent conduct."¹

Murder and Manslaughter.—The difference between murder and manslaughter, as the foregoing shows, differs widely from that between the German conceptions "Mord" and "Totschlag," which latter difference is strongly criticized by Stephen,² and in the German literature also: (a) "*Überlegung*" (premeditation) plays no part in English law; it is replaced by the conception of "malice aforethought."³

(b) Homicide committed intentionally or with *dolus directus* is not murder, but only manslaughter, when the perpetrator has acted under "gross provocation."⁴ A slight provocation does not suffice. In German law the conception of gross provocation would border partly on § 213 StGB,⁵ partly on the conception of "Notwehr" (§ 53 StGB). Whilst, however, § 213 does not cause a transformation of the legal conception "Mord" into "Totschlag," but only a mitigation of punishment within the scope of the statute dealing with Totschlag, an application of § 53 leads to an impunity which, in English law, can arise only in the most serious cases of gross provocation. The English conception of self-defence is narrower than the German "Notwehr"; self-defence, for instance, in cases of attacks upon the property is in English law more restricted than in German law.⁶

(c) According to English law it is also murder (in the absence of gross provocation, etc.) when the actor knew or ought to have known that he was endangering another person's *life* or, at least, another person's health in a serious degree.⁷ This conception of murder (the so-called "constructive murder")⁸ covers a part not only of the German "Mord" and "Totschlag," but also of the "*Körperverletzung mit tödlichem Ausgange*" (§ 226 StGB) and of the "*fahrlässige Tötung*" (§ 222 StGB). Not every degree of negligence, however, is sufficient.⁹ It is simply manslaughter, when the actor only knew or ought to have known that he was endangering another person's health in a slight degree.¹⁰ Just as

¹ Stroud, p. 182.

² Stephen, *History*, iii, p. 99: "I cannot understand on what principle a man who is guilty of the premeditated murder of the seducer of his wife or daughter is to be punished with greater severity than a man, who, because a husband forbids him to frequent his wife's company, immediately knocks down the husband and despatches him by repeated stabs with a knife." But it ought not to be overlooked that, in the first alternative, the courts often may answer the question of "*Überlegung*" in the negative.

³ See Kenny, pp. 135 *et seq.*; Perkins, *loc. cit.*

⁴ Kenny, pp. 116 *et seq.*

⁵ § 213 runs as follows (translated by Drage): "If the manslayer was excited to anger without any fault of his by a wrongful act, or by serious insult inflicted on him or a relative of his by the person slain, and was by this means carried away to commit the act, or if other extenuating circumstances exist, the punishment of imprisonment with labour for not less than six months takes place."

⁶ Kenny, pp. 104, 105-6, 118.

⁷ Perkins, p. 556.

⁸ Harris-Wilshire, *Principle and Practice of the Criminal Law*, 15 ed., 1933, p. 195; Stroud, *loc. cit.*

⁹ Perkins, p. 556.

¹⁰ Turner, *loc. cit.*, pp. 68-9.

murder can be committed wilfully or negligently, manslaughter can be committed both wilfully or negligently ("voluntary" or "involuntary" manslaughter).¹ The difference between murder and manslaughter consists, in cases of homicide due to negligence, in the degree and nature of the negligence (viz. whether the actor by his negligence endangers life or health in a serious degree or only health in a slight degree).

In this connexion, the problem of *versanti in re illicita* needs a further examination: undoubtedly, the mere fact that the serious result happened, when the wrongdoer was committing an unlawful action, does not suffice to make him responsible for that result. That is a plain consequence of the idea of endangering and has been already proved above when I discussed the cases *R. v. Faulkner*, *R. v. Franklin*, etc. Turner, who opposes the contrary opinion of the revisers of Stephen's *Digest* (7 ed.) draws the practical application of this principle to motor-car disasters: a mere transgression of the speed limit does not justify a conviction for manslaughter in case of a fatal result; rather is it necessary for such a conviction to prove that the actor by transgressing the speed limit had endangered other persons.² On the other hand, however, when a person is committing an unlawful act—as Stroud's remark, quoted above, shows—a somewhat slighter degree of endangering other persons is sufficient than in a case of lawful actions.³

Negligence.—As to the terminology, Austin differentiates as follows: "Negligence and heedlessness are precisely alike. In either case, the party is inadvertent. In the first case, he does not an act which he was bound to do, because he adverts not to it. In the second case he does an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. . . ." ⁴ By that, Austin, evidently means only unconscious negligence, whilst his expression "rashness" only means conscious negligence.⁵ Setting aside these questions of terminology, the chief differences between the two legal systems are the following:

(a) In English law an action due to negligence is punishable in fewer cases than in German law; so, for instance, burning and swearing of false oaths are not punishable when only due to negligence.⁶

(b) The possibility of applying the conception of negligence is limited by the fact that—as ensues from the foregoing—many actions which, in German law, are treated as "fahrlässig" are, in English law, punished as actions committed with intent.

(c) English law, when punishing the commission of an unlawful act due merely to negligence, demands a higher degree of negligence than does German law. Thus, Clark says: ⁷ "The tendency of our law is perhaps rather to hold a man liable in damages than criminally for want of the competent skill." In *R. v. Elliott* ⁸ the court stated: "For intellectual

¹ Kenny, pp. 116, 120.

² Perkins, pp. 559–60.

³ See also Turner, p. 66.

⁷ *Analysis*, p. 104.

² Turner, p. 71.

⁴ *Lectures*, vol. i, p. 440.

⁶ Kenny, pp. 165–6 and 314.

⁸ 16 Cox 710.

defect, for mere mistake of judgment he cannot be found guilty. That is the subject of the civil remedy." Slighter degrees of negligence are not punishable at all. In *R. v. Baleman*,¹ a case that deals with the problem of responsibility of physicians giving assistance at a confinement, it is held: "In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. . . . In the criminal court, on the contrary, the amount and degree of negligence are the determining question." The difference between criminal and civil negligence has always been strongly emphasized in English doctrine and practice.² The antagonism, however, seems to consist more in the fact that the average requirements, the non-fulfilment of which may produce a criminal conviction, are on a higher level than the average requirements, the non-fulfilment of which may lead to an obligation to pay damages. But it does not appear that English law applies, as does German law, at least theoretically,³ a subjective standard of negligence in criminal cases. Kenny, for instance, says: ⁴ "A person may be criminally negligent although taking all the care that he can. For if he undertake the work of an expert . . . he must exercise an expert's skill." ⁵ And Keedy,⁶ who, it is true, deals with this question more with reference to American law and especially to the doctrine of error, calls attention to a decision *Commonwealth v. Pierce*,⁷ which stated: "that the care of a reasonable prudent man under similar circumstances should be the test in criminal as well as in civil cases." Keedy himself inclines more to a subjective standard.

Neither in English nor in German Criminal Law does contributory negligence justify impunity, although it may lead to a mitigation of punishment.⁸

Mens Rea and Necessity.—The idea that mens rea is not merely the conception set above the subspecies intent, malice, negligence, etc., without an independent substance of its own, is to be found also in the English literature; see, for instance, Stroud's remarks: ⁹ "A lunatic may well be capable of forming a clear intent to defraud or a full homicidal 'malice,' or intent to kill, and yet be quite incapable of mens rea, so as to be entitled to an acquittal."

The conception of necessity is more limited in English than in German Criminal Law. Since it is impossible to go into particulars, reference may be made to the remarks of Stephen,¹⁰ Salmond,¹¹ Stroud,¹² Kenny,¹³

¹ (1925) 28 Cox 33.

² Stroud, p. 126; Kenny, p. 123.

³ *Journ. Comp. Leg.*, vol. xvii, pt. i, pp. 99-100.

⁴ Kenny, p. 125.

⁵ Cf. 12 Cr. App. R. 153; 22 Cr. App. R. 8.

⁶ Keedy, 22 *Harvard Law Review* (1909), p. 85 fn. 2. See also Sayre, *Harvard Legal Essays* (1934), p. 413.

⁷ 138 Mass., 165, 178.

⁸ Stroud, p. 138; Kenny, p. 124.

⁹ Stroud, p. 18.

¹⁰ Stephen, *General View of Criminal Law*, 2 ed., pp. 76-7.

¹¹ *Jurisprudence*, pp. 406 et seq.

¹² Pp. 258 et seq.

¹³ Pp. 75-8, esp. 78, fn. 3.

and, as to American law, to the decision *State v. Moe*.¹ In this last case the court said: "As for economic necessity being a defense to riot, there are neither cases nor comments by text-writers, but the law generally judges a man by his act and intent, not by his reasons or motives for so acting. An analogy might be drawn to compulsion, which is a recognized defense to practically all crimes. But the courts are agreed that for compulsion to be a good defense there must be an immediate danger to life or person, and in practically all cases where compulsion has been alleged it has not been held a defense because the danger was not imminent. However, such immediate and imminent danger in cases of economic necessity would exist only where death by starvation or exposure could not be postponed except by an immediate wrongful act. In such cases alone can hunger and want logically be legal defenses."

Punishment without Guilty Mind.—There are to be found in English Criminal Law many instances of punishment without guilty mind. The question is whether the leading principles are the same in English and in German law. In both systems external as well as internal reasons are brought forward in support of the thesis that exceptions to the requirement of mens rea should be made. It is emphasized, *e.g.*, that there are offences of so frequent occurrence that the great number of cases with which the criminal courts have to deal renders impossible an examination of the mental status of the individual offender.² This criterion is, however, unsatisfactory. The number of larcenies committed, *e.g.*, is also very great; nevertheless, nobody would suggest that acts of larceny should be punished when committed without mens rea. Closely connected with this idea is the argument that an examination of the mental status of the offender is sometimes so difficult that, on account of the smallness of the penalty incurred, it may not be worth while to undertake this task.³ English as well as German jurists have, however, not contented themselves with these external reasons. It was pointed out that the aim of certain penal statutes may differ from that of others in so far as their object is neither retaliation nor deterrence, but simply to stop the mischief⁴ or to enforce a civil right.⁵ Even this point of view, however, cannot be regarded as a solution of the problem, because it does not answer the question why this difference exists. It cannot be explained exclusively by the smallness of the penalty. Nor is the contrast between *mala in se* and *mala prohibita* identical with the distinction between the statutes which require mens rea and those which do not.⁶

¹ Wash. (1933) 24 Pac. (2d) 638, *Michigan Law Review*, vol. xxxii, no. vii (May 1934), p. 1005.

² See, *e.g.*, Sayre, *Harvard Legal Essays*, p. 404.

³ Kenny, p. 45; Stallybrass, *Journ. Comp. Leg.*, vol. xiv, pt. i, p. 47.

⁴ Stroud, *op. cit.*, pp. 33-4; Erik Wolf, *Festgabe für Reinhard Frank* (1930), vol. ii, 519; Kenny, p. 46.

⁵ See the *Commentary on the Indian Penal Code*, by Ranchhoddas and Thakore, 13 ed., Bombay, 1931, p. 63.

⁶ See Allen, *Legal Duties*, pp. 239-40.

There are, therefore, some other explanations attempted by Anglo-American as well as by German jurists. Max Ernst Mayer,¹ *e.g.*, used the following formulation: Some criminal statutes are based upon "Kulturnormen," *i.e.* upon the cultural conceptions of the people, whilst others, lacking the support of such conceptions, are to be obeyed solely to maintain good order within the community and to facilitate the tasks of the authorities. It is of no importance, *e.g.*, whether the Highway Code for motorists prescribes turning to the right or to the left. Another attempt was made by the doctrine of the so-called "Verwaltungsstrafrecht," *i.e.* Administrative Criminal Law. This doctrine deals with those criminal statutes which aim at the promotion not of justice, but of good administration.² The formulations used by Allen ("social expediency" instead of "intrinsic wrongfulness")³ and Sayre ("true crimes" — "public welfare offences")⁴ seem to indicate similar ideas. There is, however, among German writers by no means unanimity as to the question whether the Administrative Criminal Law should renounce in principle the requirement of *mens rea*, or whether it requires a specific form of *mens rea*.⁵

Apart from the similarity of the theoretical foundation, both legal systems have in common a tendency to increase the number of statutes which do not require *mens rea*. There are, however, to be found decisions of English courts which seem to go beyond the limits drawn in German law for convicting a prisoner without proof of *mens rea*.⁶

Mistake.—The doctrine of mistake in English law offers a further proof of the correctness of the statement that English law does not draw so sharp a distinction between intention and negligence as does German law between *Vorsatz* and *Fahrlässigkeit*. It is with this difference that the main contrasts are connected:

(a) The German principle, contained in § 59 StGB, that every mistake—however negligent—provided that it is recognized by the law at all, is able to negative the *Vorsatz* (not, of course, the *Fahrlässigkeit*)—such a principle is not valid in English law. On the contrary, in English law a mistake which is not reasonable does not lead to impunity.⁷ The fact that an evil result is due to a mistake caused by negligence can, therefore, justify a conviction for a wilful crime.

(b) Whilst German law differentiates between error *in objecto* and

¹ *Der Allgemeine Teil des deutschen Strafrechts* (1923), pp. 37 *et seq.*, 55 *et seq.*

² See especially J. Goldschmidt, *Verwaltungsstrafrecht* (1902); Erik Wolf, *op. cit.*

³ *Legal Duties*, p. 237.

⁴ *Harvard Legal Essays*, p. 408.

⁵ See Erik Wolf, *op. cit.*, pp. 568 *et seq.*, 573.

⁶ See, *e.g.*, *R. v. Leinster*, [1924] 1 K.B., 411.

⁷ See Kenny, p. 68; Stallybrass, *op. cit.*, p. 49; *Indian Penal Code*, ss. 79 and 52; *R. v. Horton*, 11 Cox 670; *R. v. Matthews*, 14 Cox 5; *R. v. Wheat*, [1921] 2 K.B. 119 and many other decisions; as to the American doctrine Keedy, *loc. cit.*, p. 84.

aberratio ictus, the latter is, in English law, as unimportant as the error *in objecto* is in case of equivalence of the injured objects.¹

(c) The further difference, which consists in the fact that English law does not acknowledge the contrast, drawn by the German Reichsgericht, between mistakes concerning the Criminal Law and mistakes concerning the Non-Criminal Law, is not based upon general differences concerning the doctrine of mens rea, but upon some peculiarities of the German dogmatic history.

As for the rest, however, the analogies between the two legal systems hold good :

(a) The differentiation between mistakes of fact and of law forms also the foundation of English law.² The difficulties of this contrast are duly appreciated in the English literature : first the difficulty of drawing any such line of demarcation at all ;³ secondly, the necessity of putting certain cases of mistake of law on an equal footing with the mistake of fact.⁴ Here an important rôle is played by certain crimes, larceny for instance, which presuppose that the actor is in no error as to the legal situation. If the actor thinks himself entitled to take away the thing in question, he cannot be guilty of larceny.⁵ Just as in the German doctrine, one is inclined to maintain in certain cases that the mistake of law is inseparably connected with a mistake of fact, or that the latter led to a mistake of law ; thus, the mistake of law is to be taken into account in favour of the actor.⁶ " The general tendency of English decisions has been to admit the defence of mistake wherever the supposed right would depend upon mixed questions of law and fact." ⁷ The consideration of the " Subsumtionsirrtum " is controversial ; the question of its legal approbation is answered, for instance, by Bishop⁸ in the negative, by Keedy in the affirmative.⁹ Keedy differentiates between an error

¹ Kenny, pp. 149-50 ; Russell, 8 ed., vol. i, pp. 842-3 ; Holdsworth, *History*, vol. viii, p. 435 ; Stroud, p. 183 ; Perkins, p. 552 ; *R. v. Latimer*, (1886) 17 Q.B.D. 359 ; Bishop, *Crim. Law* i, § 328. See, furthermore, *Italian Crim. Code*, arts. 82-3.

² See, for instance, Stephen, *Digest of Criminal Law*, 7 ed., 1926, arts. 44-5 ; Kenny, p. 69.

³ Stallybrass, *op. cit.*, p. 69 ; Stroud, pp. 55 *et seq.* ; as to the differentiation between law and fact in general see Cohen, *The Spirit of our Law*, 2 ed., 1922, pp. 66, *et seq.*

⁴ Stephen, *Digest*, pp. 38 *et seq.* ; Stroud, pp. 56 *et seq.* (quoting, e.g., *Lolley's case*) ; Kenny, p. 70 ; Bishop, i, § 297.

⁵ Kenny, p. 70 ; Keedy, pp. 88 *et seq.* ; *R. v. Wade*, 11 Cox 549.

⁶ Stroud, p. 60 ; Stallybrass, *op. cit.*, p. 49.

⁷ Stallybrass, *op. cit.*, p. 50.

⁸ Vol. i, § 309, fn. 4 with reference to *R. v. Hicklin*, L. R. 3 Q.B. 360 : " The man was not mistaken as to any fact. The difference between him and the magistrate who found the facts was not as to them, but as to their tendency. It was a question of *opinion*. And looking at this question still more closely, we perceive it to be really one of law. . . . If a man thinks a certain publication is not obnoxious to this inhibition, but the court thinks otherwise, it is in him ignorance of the law, which does not excuse."

⁹ *Loc. cit.*, p. 90.

concerning only questions of law *in abstracto* (which error he calls "ignorance of law") and, on the other hand, "an act under misconception of the legal effect of certain facts; that is, he gets a wrong view of a situation as a result of an improper application of law to facts." The latter alternative, which corresponds to the "*Subsumtionsirrtum*," is called by Keedy "a mistake of law"; and he says that the mental attitude of the actor in these cases corresponds to the attitude in cases of mistake of fact.

The problem whether the actor, in order to fulfil the legal requirements of punishment, has to know that he is doing something legally wrong (at least in the sense of a mere civil tort), or whether it suffices that he believes himself to be doing something only morally wrong, is usually discussed with reference to the famous cases *R. v. Prince*,¹ and *R. v. Tolson*.² It seems to be now acknowledged unanimously that a mere ethical standard is too vague.³ This corresponds to the opinion which prevailed also in German science of Criminal Law till recently.

Finishing this survey, I may venture to say that the contrast between the two legal systems is, in practice, not so important as might be assumed by an observer who limits himself merely to a comparison of the theoretical conceptions. Moreover, there seems to be a growing tendency towards an assimilation of these conceptions themselves, due, to a certain degree, to the changes which I have endeavoured to indicate in the course of this essay.

¹ (1875) 2 C.C.R., 154.

² (1889) 23 Q.B.D., 168.

³ Kenny, *op. cit.*, p. 42; Sayre, *op. cit.*, p. 1025.

INTERNATIONAL LAW AND THE OPIUM CONVENTIONS.

[Contributed by JOSEPH STARICOFF, Esq., B.A., LL.B., B.C.L.]

The Opium Conventions as International Legislation.—The International Conventions dealing with the drug traffic may well be described as International Legislation. It is true that this expression is one which has not escaped criticism. Critics have concentrated on the absence of any body analogous to a national legislature.¹ Yet it is difficult to think of the process whereby matters of international concern are subjected to international regulation by the agreement of interested States, without attributing to it a definite legislative character. If the result means more than the procedure which brings it about, then it is legitimate to say that the Opium Conventions do make International Law with respect to an entirely new subject, and that they therefore constitute Acts of International Legislation.

The three principal Opium Conventions, the Hague Convention, 1912, the Geneva Convention, 1925, and the Limitation Convention, 1931, represent, much as does national legislation dealing with a particular subject, the empirical development of a definite legislative policy. These Conventions are akin to the great number of multilateral conventions which have come into being in the twentieth century in so far as they reflect the utilitarian spirit of international legislation: utilitarian and pragmatic, for without a certain end conceived as a common national interest, no international agreement is possible. In the case of the drug traffic, the international interest lies in the fact that national administration becomes more effective when supplemented by a rigorous international control of world production, manufacture and trade in drugs.

Of the three Conventions, the Limitation Convention, 1931, is naturally the most important. It extends and develops the previous Conventions and adds new machinery of its own. The Convention merits the description by the League Assembly as embodying "a bold conception without precedent in the history of International Relations and International Law."² Yet it is not entirely an independent document. The three instruments in fact are interdependent; each implements or supplements the others, and the Limitation Convention must be read in the light of

¹ For justification of the term, see *International Legislation*, Hudson, pp. xiii–xv; see also Knudson, *Methods of International Legislation*, and Fischer Williams, *Chapters on Current International Law and the League of Nations*, p. 35.

² See Report of the Fifth Committee to the League of Nations Assembly, Sept. 25, 1934, Doc. A.51, 1934, xi, p. 2.

those texts which precede it. They have one characteristic in common, which confers a further right to the title of International Legislation, viz. their universality. The Hague Convention has been ratified by 59 States, the Geneva Convention by 53, and the Limitation Convention by 56; the scope of their operation is therefore, for all practical purposes, world-wide.

Technical Difficulties of International Legislation.—The relative slowness of the ratifications of the Conventions illustrates very strikingly the technical difficulties of international legislation, difficulties of which there is no parallel in the national field. The two main causes of delayed ratification,¹ the complexity of modern national government and the necessity for changes in the national laws of States parties, were both operative in the case of the Opium Conventions, and it says much for the pressing interests involved in an international control of the drug traffic, that these Conventions have become the most widely ratified of all multipartite instruments. But one considerable difficulty still remains. Certain States have ratified only one of the Conventions, certain States have ratified only two, and certain States, finally, have so far ratified none of the Conventions. The States of the world are therefore divisible into: 1. States which have ratified all three Conventions. 2. States which have ratified only one Convention (three classes of States). 3. States which have ratified two Conventions (again three classes of States). 4. States which have ratified none of the Conventions. Thus for the purposes of the three Conventions, there are now eight different categories of States. It is obvious how this tends to burden the application of international legislation dealing, as the Opium Conventions do, with only one subject-matter. International control is made more difficult to apply, more complex in its operation. Legal obstacles are raised against the universality of the instruments, and the uniformity of the supervision they seek to impose. There is consolation alone in the fact that there was deliberate prevision of these possibilities in the Conventions, and that the texts were consciously shaped so as to guard against their universality being impaired. Illustration of this will be provided in the discussion below on the operation of the embargo proceedings under the Limitation Convention as against non-parties.²

A further difficulty lies in the interpretation of the Conventions. The texts are the result of successful attempts, and in many cases a not too successful attempt, to find formulæ satisfactory to all the contracting parties. Naturally this has been at the expense of clarity and precision.³ Added to this there is the complexity of the material dealt with

¹ For a general study on the whole problem of ratification of multilateral conventions, particularly the causes of delay in ratification, see Report of a Special Committee of the League, May 9th, 1930, Doc. A.10, 1930, v.

² See Arts. 2, par. 3, and 14, par. 2.

³ The Secretariat of the League of Nations is shortly publishing a Commentary on the Limitation Convention; the very necessity for a Commentary illustrates the point made above.

by the Conventions, which renders their application to particular cases so difficult in practice. The Limitation Convention, for instance, sets up a very elaborate system of world accountancy of drugs and it would be too much to expect the text to be applicable to all situations with a minimum of recourse to principles of legal construction. In fact, it was inevitable that legalism¹ would flourish in such soil, but as a natural and healthy development to which all multilateral instruments are subject.

However, by far the greatest difficulty with the international drugs legislation has been its necessary incompleteness: incomplete, because international conventions leave a great deal to be done by national legislation to elaborate fully in national idiom what has to be expressed in the form of a general obligation binding a great number of contracting parties. International legislation, indeed, is represented more exactly by the formula, Conventions *plus* national legislation. Consider Art. 15 of the Limitation Convention, 1931:

The High Contracting Parties shall take all necessary legislative or other measures in order to give effect within their territories to the provisions of this Convention.

The High Contracting Parties shall, if they have not already done so, create a special administration for the purpose of:

- (a) Applying the provisions of the present Convention;
- (b) Regulating, supervising and controlling the trade in the drugs;
- (c) Organizing the campaign against drug addiction by taking all useful steps to prevent its development and to suppress the illicit traffic.

It is not difficult to think of the serious problems which the application of this Article is bound to raise in the future. Constitutional obstacles in Federal States, lack of real uniformity in the national measures adopted,² etc., will certainly prevent the Limitation Convention working as smoothly and universally as hoped.

In respect of other Conventions adopted under its auspices, the experience of the League of Nations has been that international legislation can only be effective with the aid of a permanent secretarial body to pool information, to receive reports, and to make continual study of national enactments. For the purposes of the international drugs legislation, these functions are now being discharged by the Opium Traffic Section of the League Secretariat. That Section has recently begun a comprehensive study of national measures dealing with drugs, with the object ultimately of testing their conformity to the Conventions in force. This represents of course an analysis of comparative legislation on a large scale, and the necessity for making it clearly demonstrates that the problems faced by international legislation are utterly unlike those normally dealt with by national legislatures.

¹ Attention should be drawn to the number of questions of interpretation which have been discussed at the recent sessions of the Opium Advisory Committee.

² In order to make for as much uniformity as possible, Model Administrative Codes for both the Geneva Convention and the Limitation Convention have been drawn up and circulated to all Governments. See Doc. C.774, M, 365, 1932, xi.

Let us now consider the system established by the international drug conventions.

The System of Legal Limitation.—The Hague and Geneva Conventions had sought, for the most part, to confine channels of trade and distribution to legitimate traffic only. On them, the Limitation Convention, 1931, constitutes a considerable advance.¹ It attacks the problem directly, and from the outset. The system of control is organized on an international basis through three clearly defined stages:²

(1) In the first stage, the legitimate drug requirements of the world for the ensuing year are determined in advance according to estimates supplied by Governments. A central international organ known as the Supervisory Body draws up a plan of the estimated world requirements, and this is incorporated in a Statement circulated to Governments. Once embodied in the Statement, the plan is legally binding on all States Parties, who are under a strict obligation not to exceed the estimates fixed for them in the statement.

(2) The second stage consists of supervision by national and international authorities of manufacture and trade during the year. The export and import returns of drugs are examined quarterly by a body called the Permanent Central Opium Board, which has the right in certain cases of putting into operation a world-wide embargo on the exports of drugs to a particular State. The important provision which confers this right is Art. 14, par. 2 :

If it appears from the import and export returns made to the Permanent Central Board or from the notifications made to the Board in pursuance of the preceding paragraph that the quantity exported or authorized to be exported to any country or territory exceeds the total of the estimates for that country or territory as defined in Article 5, with the addition of the amounts shown to have been exported, the Board shall immediately notify the fact to all the High Contracting Parties, who will not, during the currency of the year in question, authorize any new exports to that country except :

(i) In the event of a supplementary estimate being furnished for that country in respect both of any quantity over-imported and of the additional quantity required ; or

(ii) In exceptional cases where the export in the opinion of the Government of the exporting country is essential in the interests of humanity or for the treatment of the sick.

(3) The third stage involves the examination of the statistics of trade and manufacture for the past year, and their comparison with the esti-

¹ There is one important difference between the Geneva Convention and the Limitation Convention which should be noted : the Limitation Convention deals solely with manufactured drugs, and raw materials are covered by it only in so far as the processes of manufacture are affected ; the Geneva Convention extends, however, to drugs in the raw state.

² The following outline of the system of limitation is based on that given in the League document, " Analogies between the Problem of the Traffic in Narcotic Drugs and that of the Trade and Manufacture of Arms," Conf. D.159, p. 8.

mates in the Supervisory Body's Statement. Here again the Board has the right to enforce embargo proceedings against a State which has exceeded its estimates,¹ and in all cases it has the right, and indeed the duty, to ask for explanations where there is any suggestion that a particular State *may* have failed to carry out its obligations.

The system as just outlined raises questions of considerable legal interest. Let us consider first the embargo proceedings under Art. 14.

The Embargo Proceedings.—The embargo is a sanction of a unique character for enforcing obligations which devolve on States under the Convention. It is a preventive proceeding, designed to stop a particular State from becoming a centre of illicit traffic, and as such its counterpart in national law is the injunction. Perhaps it is the only form of injunction possible in the International Law of drugs, for a decision that a certain State shall not continue to import drugs would be ineffective unless all the other States had previously undertaken to cease their exports in such circumstances. It may be going a little too far to describe it, as the League Assembly has done, as "a proceeding . . . without precedent in the history of International Law."² The important point to make here is that the embargo has not remained a dead letter, and has indeed already been put into force on a number of occasions. It is true that it is not as a rule applied where small excesses are involved and its employment would accordingly be inconsistent with the spirit of the Convention. Nevertheless, as the Fifth Committee of the League Assembly reported, "the demonstration which the Central Board has given of the reality of the provisions of Art. 14 of the Convention serves as a useful reminder of the fact that the obligation under the Convention not to exceed the estimates is clear and categorical."³

It is notable that the embargo is a sanction put into operation by an international organ, independently of the action of any other body, judicial or administrative.⁴ Moreover, the obligation of each State Party, on receiving notification from the Permanent Control Board, is clearly and precisely defined:

. . . the Board shall immediately notify the fact to all the High Contracting Parties, *who will not, during the currency of the year in question, authorize any new exports to that country except . . .*

and is immediate and automatic on communication of the Board's decision. While the embargo is thus so effective a sanction, it is not the only guarantee that obligations under the Convention will be fulfilled. There is first of all the good faith of the States who have undertaken to perform these obligations. There is again the fact that wide publicity is given

¹ Art. 14, par. 3 of the Limitation Convention and Art. 24, par. 2 of the Geneva Convention.

² See Report of the Fifth Committee, *op. cit.*, p. 11. An imposing precedent is of course supplied by Art. 16 of the League Covenant.

³ Report, *op. cit.*, p. 2.

⁴ Contrast Arts. 15-16 of the League Covenant.

to the work and activity of the international organization combating the drug traffic. And finally, there is the paramount interest which each State has in the suppression of illicit traffic and in the equalization of the conditions of competitive trade and manufacture in drugs.

The Convention and Non-Parties.—Another striking feature of the Limitation Convention is its operation with respect to non-Parties. As a general rule, no treaty may bind a State not party to it; two or more States cannot agree between themselves to cast an obligation on another State. This general principle might have been a considerable obstacle to the draftsmen of the Limitation Convention, preoccupied as they were in the task of making the text as universal in its operation as possible. However, it was got over in ingenious fashion. The Convention does not in terms say that a non-Party is under any defined obligation. But a non-Party is made responsible exactly as if the obligation existed, and is made subject to embargo proceedings under the same circumstances as contracting Parties.

The texts which establish this important precedent in International Law are Art. 14, par. 2, quoted above (note particularly the words "any country or territory") and Art. 2, par. 3, which reads:

The Permanent Central Board shall request estimates for countries or territories to which this Convention does not apply to be made in accordance with the provisions of this Convention. If for any such country estimates are not furnished,¹ the Supervisory Body shall itself, as far as possible, make the estimate.

It is when these estimates, fixed for non-Parties by the Supervisory Body, are exceeded, that embargo proceedings are enforced against the non-Parties concerned. It may be argued, and indeed it has been strongly contended,² that the Convention does not impose a specific obligation on non-Parties, but may affect them in case they exceed those estimates which *ex hypothesi* are not binding on them. Even if this view be accepted, it would appear to be difficult to fit the legal position of non-Parties within any of the recognized categories.³

The provisions of the Limitation Convention have a curious parallel, and a precedent in Art. 17 of the League Covenant. There, there is nothing explicit imposing an obligation on a non-member of the League, but on refusal to accept the obligations of membership in the League for the purpose of the dispute, and its resort to war, the non-Member State becomes liable to the sanctions provisions of Art. 16. Again,

¹ Certain non-parties to the Limitation Convention regularly furnish estimates. The Supervisory Body has only found it necessary, in its Statement for 1936, to frame estimates for five non-Parties who did not submit individual estimates; on the other hand, eleven non-Parties furnished estimates in accordance with the provisions of the Convention.

² Records of the Limitation Conference, vol. i, pp. 101-2.

³ Perhaps following Professor Hohfeld's famous classification of "jural relations" (see Hohfeld, *Fundamental Legal Conceptions*), it might come within its definition of "a liability."

responsibility is imposed without mention or definition of any precise obligation.

International Administrative Law.—In the Report of the Fifth Committee to the League Assembly, 1934, it was said: ¹

Legally and administratively, the Limitation Convention has not merely imposed reciprocal obligations on States, but by establishing for the first time the principle of the complete supervision of an entire industry, it has made provision for and prescribed the organization of a real international administration, which will henceforward regulate and supervise, day by day, the relations of the contracting parties. . . .

It is noteworthy that the international administration so established is not free from what has, fortunately or unfortunately, become a recognized feature of national administrations, namely the exercise by administrative bodies of quasi-judicial functions.² Thus the Permanent Central Board in enforcing embargo proceedings is acting almost as a judicial body. The same remark, to a lesser extent, applies to the Supervisory Body when engaged in fixing the estimates for all States, determinations which certainly bear a quasi-judicial character. This mingling of judicial and administrative functions would, however, appear to be not only a necessity of international government, but a vital and healthy feature of it. Moreover, this international "droit administratif" is not without strong guarantees for its proper application. There is the constitution of the two international organs concerned, there is the general supervision by the League Council and there is the possibility, under Art. 25 of the Limitation Convention, of submitting disputes as to the application of the Convention to "arbitration or judicial settlement." Under these circumstances, the criticism³ recently levelled at national administrations for their uncontrolled exercise of judicial functions would appear to be inappropriate to the international drugs administration.

Future Drug Conventions.—Finally, a few words may be said on the subject of future international drugs legislation. At present, a Draft Convention for the Suppression of Illicit Traffic is in course of preparation, its object being to co-ordinate the criminal laws of the various countries and so prevent drug traffickers escaping their due punishment. When completed, the Convention will constitute an important advance in international criminal law.⁴ A further necessary step in international drugs legislation will be the conclusion of a Convention dealing with the limitation of production of raw materials. A study is now being made of the question as a preliminary to the drafting of texts. The international legislative process, once begun, seems to be unceasing.

¹ Report, *op. cit.*, p. 2.

² See Port, *Administrative Law*.

³ See *Bureaucracy Triumphant*, C. K. Allen, *passim*.

⁴ This Convention, when finally concluded, will have had the benefit of the new procedure for multilateral conventions initiated by the Resolution of the League Assembly, dated September 25, 1931.

CASES ON THE CONFLICT OF LAWS FROM THE LAW
REPORTS OF THE BRITISH DOMINIONS, 1933-4.

[Contributed by PROFESSOR R. W. LEE, D.C.L.]

1. Statutory Adoption of Children—Effect of—Competence of Court to Decree.—*Culver v. Culver and Gammie* (Saskatchewan King's Bench), [1933] 2 Dominion Law Reports 535. This was an application in the course of divorce proceedings for an order as to the custody of an infant, adopted child of parties between whom a decree *nisi* for divorce had been pronounced. It was stated that at the time of the adoption the adopting parents were domiciled in Saskatchewan, the child in Alberta. The order of adoption was made by an Alberta court. Taylor J.: "The English court has held [*Bednall v. Bednall*, 1927, P. 225; *Green v. Green*, 1929, P. 101] that in a case of a child not born in wedlock and alleged to be legitimated by subsequent marriage the Court cannot in divorce proceedings make an order for custody in respect of such a child unless there has been a previous declaration declaring the child legitimate under the Legitimacy Act, 1926. An order for custody would imply a declaration of legitimacy and such a declaration cannot be made by the Court in divorce proceedings when the child and other parties possibly interested are not and cannot be represented. . . .

"I cannot escape the conclusion that the effect of the Saskatchewan and Alberta legislation is to bring the question for decision in this case within the legitimacy decisions. . . . The adopting mother is having other children; the adopting father is at liberty to marry again. What relationship and rights of succession will this adopted child be in and have in these contingencies? . . . Does the domicile of an adopted child follow that of the adopting father? Has the Court in one Province the right to make an order for adoption the effect of which will be to change the domicile of the child affected by the order from that Province to another?

"The result of adoption under foreign laws was considered in the Saskatchewan Court of Appeal in *Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129, 20 S.L.R. 407, which I think may be said to have been inferentially approved by the Supreme Court of Canada in *Re Donald, Baldwin v. Mooney*, [1929] 2 D.L.R. 244.¹ . . . I would infer from the reasons for judgment of Hamilton C.J. in the *Burnfiel* case, that in his opinion an order for adoption can effectually be made only in the Court of the

¹ See *Journ. Comp. Leg.*, vol. xvi, pt. i, p. 107.

country in which both the adopting parent and the adopted child are domiciled at the time of the order.

"These considerations impel me to the conclusion that in these proceedings no decision can be given effectually determining the nature of the relationship between the alleged adopting parents who alone are before the Court and the adopted child."

2. Situs of a Debt.—*Re Sawtell, Ex parte Bank of Montreal* (Ontario Court of Appeal), [1933] 2 D.L.R. 392. This was an appeal from the Judge in Bankruptcy dismissing a motion on behalf of the Bank of Montreal for payment by a Trustee in Bankruptcy of a sum of money representing dividends upon certain shares in the Bank of Montreal alleged to have been paid by mistake. The dividends were the proceeds of bank stock bequeathed to the bankrupt upon the express condition that it should not be liable to seizure or attachment by creditors. According to the evidence of experts in the law of Quebec the effect was to put both the stock in question and dividends therefrom out of the reach of creditors of the stockholder.

If Quebec law applied, the sum in question did not at the date of the making of the receiving order constitute part of the property of the debtor within the meaning of the Bankruptcy Act. If Ontario law applied, it did.

Held (1) that whether the debt in question did or did not vest in the Trustee must be determined by the law of the Province in which the debt was situated. (2) That the *situs* of the debt in question was the head office of the Bank, viz. in Montreal. (3) That Quebec law applied and, the payment to the Trustee having been made in error, the money could be recovered (the Trustee being an officer of the court it was immaterial whether the alleged mistake was mistake of law or of fact). "The right of the debtor arose in Quebec and was subject to Quebec law respecting execution and seizure."

3. Proper Law of the Contract.—*Commercial Corp. Securities Ltd. v. Nichols* (Saskatchewan Court of Appeal), [1933] 3 D.L.R. 56. A contract of conditional sale of a motor-car was made in Saskatchewan and delivery of the car was made in the same Province. Shortly after the purchase of the car the purchaser removed it to the Province of Alberta, where she went for a time to reside. Later she returned to Saskatchewan, leaving the car in storage in Alberta. She defaulted in payment and plaintiff (assignee of the vendor) sold the car for about half the agreed price and sued defendant for the balance. The defence was that the plaintiff had not complied with the provisions of Alberta statutes¹ and that the contract was in consequence rescinded and the plaintiffs could not recover the balance of the price.

Held that the law to be applied was the proper law of the contract, in this case the law of Saskatchewan, where the contract was made.

¹ The Extrajudicial Seizures Act and The Conditional Sales Act, R.S.A., 1922, cc. 96, 150.

If action had been brought in Alberta "it could better have been urged that before the plaintiff could sell it should have complied in all matters of procedure with the Alberta law. But it is not necessary to decide this question here." (Mackenzie J.A.)

4. Proper Law of the Contract. Capacity whether governed by *lex loci contractus* or *lex domicilii*. Effect of statutory prescription.—*Bondholders Securities Corp. v. Manville* (Saskatchewan Court of Appeal), [1933] 4 D.L.R. 699. A contract had been entered into in Florida, U.S.A., for the purchase of certain lots there situate, and pro. notes made and payable in Florida were given in respect of the purchase-money. Action being brought in Saskatchewan, *held* that the rights and liabilities arising from the contract of purchase and the pro. notes must be determined by the law of Florida, because *prima facie* the proper law of a contract is the law of the place where it is made. The question whether one of the defendants, a married woman at the time of the contract, had contractual capacity was also to be determined by the *lex loci contractus* and not by the *lex domicilii* (*non obstante Sottomayor v. de Barros*, (1877) 3 P.D. 1 (per Cotton L.J. at p. 5): "it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile"). The case also re-affirms the settled rule that when a debt is statute-barred in a foreign country and the foreign statute goes to the remedy merely and does not extinguish the right, the foreign bar will not affect the right to sue for the debt in another jurisdiction where no such bar exists.

5. Proper Law of the Contract.—*Harris Investments Ltd. v. Smith* (British Columbia Court of Appeal), [1934] 1 D.L.R. 748. A contract in the form of a deed to secure payment of a bond issue was made in British Columbia. The property mortgaged was situate in that Province, the mortgagor was at the date of the contract resident there and the bulk of its provisions were to be performed there. The trustees named in the deed were residents in the State of Oregon. *Held* that British Columbia law was applicable in accordance with the presumed intention of the parties.¹

6. Payment in Equivalent Currency.—*Johnson v. Pratt* (Manitoba King's Bench), [1934] 2 D.L.R. 802. This raised a question with regard to a contract to pay the principal sum secured by a mortgage "in gold or its equivalent at the office of the mortgagee in Detroit, Mich." *Held* that plaintiff was entitled to an amount in Canadian dollars which would have bought the principal due to the plaintiff in U.S.A. dollars at the agreed date of payment.²

¹ See Annotation, *Contract and Conveyance in the Conflict of Laws*, by John D. Falconbridge, K.C., Dean of the Osgoode Hall Law School, Toronto, Canada. [1934] 2 D.L.R. 1.

² Dicey (5), p. 672; *Feist v. Société Intercommunale belge d'Electricité*, 50 T.L.R. 143; *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, 50 T.L.R. 147, approving the judgment of Lord Hanworth M.R. in *Broken Hill Proprietary Co. v. Latham*, [1933] Ch. 373 at p. 398; *Int. Trustee for Protection of Bondholders Aktien-gesellschaft v. The King*, 52 T.L.R. p. 82.

7. Suits for Nullity of Marriage, Jurisdiction.—*Fleming v. Fleming* (Ontario Supreme Court), [1934] 4 D.L.R. 90. After referring to *Salvesen and Administrator of Austrian Property*, [1927] A.C. 641; *Mitford v. Mitford*, [1923] P. 130; and *Inverclyde v. Inverclyde*, [1931] P. 29, the learned judge said: "The decision in *Inverclyde v. Inverclyde*, based as it is upon a most thorough review of the authorities, including *Mitford v. Mitford*, may well be followed. It must be held, therefore, that in suits for nullity on the ground of impotence the court of the parties' domicile has exclusive jurisdiction." Accordingly where parties who had always had their domicile in Ontario solemnized a marriage in California and, later, one of them, who was temporarily resident there, obtained a decree of annulment on the ground of impotence, such decree was held to be of no force or effect in Ontario.

8. Proper Law of the Contract.—*In re a Mortgage. J. and another to A.* (New Zealand Supreme Court, In Chambers), [1933] New Zealand Law Reports 1512. Application for relief under the (N.Z.) Mortgages Relief Act, 1931. This case related to a contract whereby a husband purported to give as beneficial owner a mortgage over his one-half share in the residuary estate of his father consisting of land in England. The court, applying Dicey (5), p. 603: "The formal and material validity, interpretation and effect of a contract with regard to an immovable are governed by the proper law of the contract," found that the matter was governed by the law of New Zealand, this being the proper law of the contract. Hence the New Zealand Mortgages Relief Act, 1931, was applicable both to the mortgage and to the collateral security.

9. Foreign Land, Jurisdiction.—*Eloff v. Grobler's Exor.* The South African Law Reports, [1934] Cape Provincial Division 10. This was an action to compel the fulfilment of a contract or alternatively for cancellation and damages. The contract was entered into in the Argentine between plaintiff, resident in the Cape Province and second defendant resident in the Argentine, but said to be domiciled in the Cape Province, married to his wife in community of property. First defendant had been appointed by the Court Executor Dative in the joint estate of the said wife (since deceased) and of her surviving spouse. The contract related to the exchange of certain immovable properties owned by plaintiff in the Argentine with certain immovable properties owned by the second defendant and his wife in the Cape Province.

The first defendant excepted to plaintiff's declaration for want of jurisdiction.

Sutton J.: For the excipient reliance was placed on *Rosa's Heirs v. Inhambane Sugar Estates Ltd.*, ([1905] T.H. 11), in which it was decided that the title to foreign land is not triable by any other court than that in which the land is situated. Though this is a general rule of Private International Law accepted by our courts, the mere fact that a case in our courts concerns foreign land is not sufficient to exclude jurisdiction.

In the case of *Forbes v. Uys* (T.P.D. April 19, 1933, not yet reported) where the action was merely one for damages for trespass to land in Swaziland and no question of title arose, it was held that the objection to the jurisdiction of the Transvaal court was not a sound one. So also in *Estate Cassim v. Cassim*, ([1915] N.L.R. 15), the Natal court held that it had jurisdiction to entertain an action in respect of a contract entered into in Natal relating to land in India. In that case as between plaintiffs and defendant no question as to the title to the property in question could arise.

" . . . I now come to consider whether this Court has jurisdiction in the present case. . . . The contracts in issue . . . were entered into in the Argentine, but they concern immovable property, situate partly in this country and partly in the Argentine. So far as the contracts concern the property in this country this Court has jurisdiction. If the contention of the excipient is to prevail it means that there will have to be two actions, one in our Courts in respect of the immovable property situate here and another in respect of the immovable property situate in the Argentine. Now the claim for transfer of the property situate here is rightly before this Court and the rights of the parties cannot be determined without a consideration of the contracts entered into in the Argentine. No argument was directed to the question as to what law should be applied in the interpretation and consideration of the legal effect of these contracts, and it is not necessary to decide that question now. The authorities do not appear to deal with the question of jurisdiction where a contract deals with immovable property situate in two different countries. . . . In a case like the present one, where this Court has jurisdiction in respect of the property situate here, and the dispute in reference to that property cannot be determined without a decision as to the legal effects of contracts which relate also to immovable property situate elsewhere, and where the rights and obligations of the parties in reference to the immovable property situate in the Argentine must be determined before effect can be given to the claim in respect of the immovable property situate here, then it seems to me that the convenient and proper course is for this Court to deal with the matter as a whole and to grant such relief as lies in its power and is proper and necessary in the circumstances. In my view this is not a case where the general principles of Private International Law in respect of the *lex situs* oust the jurisdiction of this Court. In England the courts have a limited but recognized jurisdiction *in personam* in cases of contract and the like in respect of foreign land. In the present case the contracts in issue were not entered into here, but there has to be part performance here. In addition the matrimonial domicile of the spouses is here. Jurisdiction was in the first instance assumed over the second defendant by means of an attachment *ad fundandam jurisdictionem* and has also been acquired by the appointment of an executor within the jurisdiction of this Court. It seems to me, therefore, that this Court has jurisdiction in the whole

matter. In support of this view I refer to Westlake, *Private International Law*, 5th ed., pp. 220-1."

10. Emergency Legislation : Proper Law of the Contract.—(a) *Barcelo and Electrolytic Zinc Co. of Australasia Ltd.* (High Court of Australia on appeal from the Supreme Court of Victoria), (1932) 48 Commonwealth Law Reports 391. A company incorporated in the State of Victoria created a series of first mortgage debentures which were secured by and issued on the terms of a deed made between the company and a trustee for the debenture holders. The trust-deed executed in the State of Victoria provided that "these presents shall be construed according to the law of the State of Victoria." The deed created a fixed charge over real property of the company in Tasmania and a floating charge over the rest of its property. The debenture holders were registered partly in Melbourne, partly in London. The question was whether they were affected by the (Victoria) Financial Emergency Act, 1931, so as to be compelled to accept a reduced dividend.

The answer depended principally upon the construction of the Statute and the constitutional competence of the Victoria Legislature. Matters of Private International Law were referred to incidentally, such as the principle of interpretation that : "Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law"¹ and : "It is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State."²

The Court was unanimous in holding (as to which there could be little question) that Victoria law was the proper law of the contract and that the Victoria Financial Emergency Act applied to the debentures in question.

Evatt J., however, based his judgment not upon the direct force of the Financial Emergency Act . . . but upon the direct force of the agreement introducing the Victorian system of law, p. 437. The adoption by the contracting parties of "the law of the State of Victoria must be taken to mean" the whole of the general law of [the State of Victoria] with respect to its own local contracts." This is analogous to the principle advocated by Lord Russell of Killowen in *In re Annesley, Davidson v. Annesley*, [1926] Ch. at pp. 708-9, for the avoidance of the *circuitus inextricabilis* of the *renvoi*, viz. by understanding it to mean a reference to the internal law of the country in question. Further, a submission to the laws of a country means a submission to a system of law including subsequent legislation.³

¹ Per Hannen P. in *Bloxham v. Favre*, (1883) 8 P.D. at p. 107, adopting Maxwell on Statutes.

² Per James L.J., in *Niboyet v. Niboyet*, (1878) 4 P.D. at p. 7, and see too per Brett L.J. at p. 20.

³ *Delaney v. Great Western Milling Co.*, (1916) 22 C.L.R. 150.

(b) *Merwin Pastoral Co. Proprietary Ltd.* and *Moolpa Pastoral Co. Proprietary Ltd.* (High Court of Australia on appeal from the Supreme Court of Victoria), (1933) 48 C.L.R. 565. In this case the question at issue was whether the New South Wales Moratorium Act, 1930-1, applied to a contract by which a company incorporated in Victoria whose principal office was situated in Victoria by an agreement in writing made in Victoria agreed to sell a station-property together with chattels in New South Wales to persons resident in New South Wales as agents for a company to be formed. The proposed company was incorporated in Victoria and adopted the contract. Both companies were registered in New South Wales for the purpose of carrying on business there. This action was brought in the Supreme Court of Victoria for instalments of purchase-money and interest on the unpaid balance.

The High Court (in appeal) held that the contract was a New South Wales contract and that it was affected by the New South Wales Moratorium Act. This result was unanimous, though two members of the Court inclined to attach most weight to the fact that the contract related to immovable property situated in New South Wales, while others had regard rather to the intention of the parties to be gathered from all the circumstances of the case.

It had been suggested in the court below that the New South Wales Moratorium was contrary to the public policy of Victoria; but this point (otherwise untenable) would in any event have brought in question s. 118 of the Commonwealth Constitution (borrowed from the American), that full faith and credit shall be given throughout the Commonwealth to the laws of every State.¹

(c) *Wragge and Sims Cooper & Co. (Australia Proprietary Ltd.)*. High Court of Australia on appeal from the Supreme Court of Victoria, (1933) 50 C.L.R. 483. There was a contract between the parties for the purchase of land in New South Wales. The purchaser, who had made default in the payment of interest on an outstanding balance of purchase-money, gave a pro. note for the amount due. The note was issued and payable in Victoria.

Held that this was a Victoria note and not affected by the New South Wales Moratorium Act.

Dixon J.: "The promissory notes were issued in Victoria and were payable in Victoria. Whichever be the test [*lex loci contractus celebrati* or *lex loci solutionis*] the governing law would be Victorian. It was argued that the governing law of the notes must be that of the contract, and that they were governed by the law of New South Wales. I think the governing law of a negotiable instrument is not to be ascertained in this manner. It is a new and independent obligation. I am of opinion that the promissory notes sued upon were not discharged by the Moratorium Act, 1930-1." Evatt J. was of opinion that the contract of sale itself should be held by a Victorian court to be governed

¹ Cf. *Bradford Electric Light Co. v. Clapper*, (1932) 286 U.S. 145 at p. 160.

by the law of Victoria in view of the fact that it contained a provision for arbitration under the Victoria Arbitration Acts.¹

(d) *The Wangamui-Rangitikei Electric Power Board and The Australian Mutual Provident Society*. High Court of Australia on appeal from the Supreme Court of New South Wales, (1934) 50 C.L.R. 581.

The Appellant Board, constituted under the laws of New Zealand, borrowed, pursuant to New Zealand statutory authority, a total sum of £310,000 from respondents. The moneys were charged upon a special rate levied upon the property of the Board in New Zealand and were secured by deeds and debentures. Principal and interest were payable in Sydney, New South Wales.

The question for determination was whether the Board was entitled to the benefits conferred by the Interest Reduction Act, 1931, of New South Wales.

The Court was unanimous in holding that New Zealand law was the proper law of the obligation to pay interest, and that the Act in question was directed to extinguishing *pro tanto* obligations to pay interest and was not merely procedural in character.

Gavan Duffy C.J. and Starke J., who pronounced a joint judgment, held that the case before them fell within the scope of the Act. "The Act has nothing to do with the intention of the parties, but embodies a policy based upon a reduction of interest, for the advantage of the State itself. The words of the Act and its object and effect as gathered from its language are wide enough and explicit enough to cover obligations to pay interest in New South Wales expressly stipulated by any contract to be there paid" (p. 597). The majority of the court, however, pronounced in favour of the respondents either because the words "obligation to pay interest" in the Interest Reduction Act "were to be restricted to obligations arising under the law of New South Wales, or because the obligation to pay interest in question being a New Zealand obligation was not an obligation "in and of New South Wales" within the meaning of the New South Wales Interpretation Act, 1897. "It is perfectly obvious that the legislature of New South Wales was not interested in dealing with and altering obligations which were quite unconnected with New South Wales."²

11. Divorce—Jurisdiction—Indissolubility of Marriage—Quebec Law.

—*Dame Stern v. Stern*, (1932) *Rapports judiciaires de Québec Cour Supérieure*, vol. 70, p. 549. Petitioner asked the court to annul a divorce obtained by her husband at Chicago in the State of Illinois, U.S.A. The spouses had a Quebec domicil. The learned judge (Désaulniers) in the Court of First Instance said that he had no jurisdiction to annul a foreign divorce. But he might say that a Quebec marriage, indissoluble by Quebec law (C.C., Art. 185) could not be dissolved by the decree of

¹ *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604.

² Evatt J. at p. 607.

a foreign court. "Il serait vraiment singulier que les tribunaux étrangers eussent plus de pouvoir et d'autorité que les nôtres. . . . La seule autorité compétente pour annuler un mariage contracté dans cette Province est le Sénat : le pouvoir donné au Sénat par l'Acte de l'Amérique Britannique du Nord constitue un grave danger social, mais je n'y puis rien."

In appeal to the Court of King's Bench *Rapports judiciaires de Québec, Cour du Banc du Roi*, vol. 58 (1935), p. 391, the judgment was upheld on the safer ground that there was no proof that the parties had ever acquired a *bona fide* domicile in the State of Illinois. Mr. Justice St. Germain, however, agreed with the lower court in holding that a Quebec marriage was indissoluble by any foreign court. Reference was made to Laurent, *Traité du Droit Civil international*, vol. 5, nos. 152 *et seq.* and to the doctrine which obtained previous to the Divorce and Matrimonial Causes Act, 1858, that an English marriage was not dissoluble anywhere.¹

¹ *Lolley's case* (2 Cl. & F. at p. 567). *Salvesen v. Administrator of Austrian Property*, [1927] A.C. at p. 661 (Viscount Dunedin).

NOTES ON IMPERIAL CONSTITUTIONAL LAW

[Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L.]

Imperial Unity in Foreign Affairs.—The one essential problem to be solved in the Commonwealth is that of combining autonomy with concerted action in vital foreign issues. Recognition has once more been accorded to the limitations of autonomy by the participation of the whole of the Commonwealth in the discussions at London of the mode to meet the situation arising out of the termination of the operation of the Treaty of Washington of 1922 as to limitation of naval armaments. As in 1930, at the successful conference of that year, it is common ground that any result achieved must apply to the whole of the Empire. This, however, raises no serious difficulties, because the other parts of the Commonwealth are naturally not anxious to undertake the grave financial burden involved in naval construction, and the views of the United Kingdom can accordingly count on general acceptance. It would clearly be invidious for any Dominion to ask the British Government to bear a heavier burden than that Government thinks reasonable, and Dominion and Indian influence must necessarily be cast on the side of strict limitation so far as that is deemed consistent with the essential security of Empire communications. It is significant that the Commonwealth has now indicated the intention of larger expenditure on defence. But, as usual, the Irish Free State has taken a distinct attitude, declining to accept the view that any Irish tonnage should be included in any total tonnage accepted internationally for the Commonwealth as a whole. This indicates the assertion of the State's right to create a naval force, and to reopen the question of the presence of the Imperial forces in Irish harbours.¹

The Ethiopian Question.—If the issue of armaments is comparatively simple in its bearing on Imperial unity of co-operation, that is not the case with the extremely difficult issues presented by the aggression of Italy on Ethiopia. The importance to the Empire of the membership of the League of Nations accorded to the Dominions and India has been signally revealed. It has overcome the natural reluctance of the Dominions to consider anything affecting European relations as within their field of interest, and has made them appreciate in an unusual measure the responsibility which rests on every member of the League

¹ Keith, *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. iv, p. 272; *The Scotsman*, January 17, 1936.

to give effect to the obligations imposed by the Covenant. It is significant that it was the Canadian representative at Geneva who brought forward the suggestion of extending to oil the operation of the system of sanctions, an initiative indeed embarrassing to the Dominion Government which took pains to dissociate itself from responsibility, while raising no objection to action being taken in that sense, if so decided by the League. In the Commonwealth of Australia there was a more serious issue raised, because of the publication at the critical moment of Mr. Hughes's work, in which he prophesied that sanctions meant war. As the Ministry was then engaged in a heated contest with the Labour opposition on the Bill which it had promoted to accord it legal power to apply such sanctions as might be resolved upon by the League, this publication was deemed by the Prime Minister so inopportune as to require that Mr. Hughes should resign office, a demand acquiesced in by that statesman, though not unreasonably with dissent from the view that his position was really inconsistent with his ministerial duties or his support of the actual measures of the Ministry. Later developments¹ afford him at least the consolation that there is wide authority for his view of the probable outcome of sanctions. It is significant that the Labour party adopted an attitude absolutely hostile to any participation in sanctions, claiming that Australia should remain neutral. This attitude, of course, would constitute a clear breach of the Covenant of the League, and the Labour view has naturally been severely condemned on that score and on the ground that the position of the Commonwealth is such that no power is more dependent on the doctrine of collective security for the maintenance of her safety than is Australia. The same argument was adduced to meet the criticisms in New Zealand of the assurances given by the late Prime Minister to the British Government of the Dominion's co-operation, and there is no reason to believe that the Labour Government, which has been established as the result of the General Election, differs in any way in its view of the situation. The Union of South Africa has also, as was to be expected from General Smuts's championship of the League, stood firm for collective action, despite the energetic representations addressed to the Ministry and the country by the Italian Minister and the difficulties involved in the subsidies granted by the Union Government to Italian shipping and in the large contracts for army purposes placed by Italy in the Union. It is, however, easy to understand that the position would have been far more difficult for the Union had the strict terms of Art. 16 been adhered to and all intercourse broken off. In fact, of course, all the Powers have gladly availed themselves of the loophole left by the Assembly recommendation² of 1921, which has been interpreted as permitting indefinite postponement of the full operation of that Article. No doubt the resolution of the Assembly has hardly the legal effect now in practice accorded to it, and in 1925 France definitely refused to accept

¹ Sir S. Hoare, House of Commons, December 19, 1935.

² Cf. Keith, *The Spectator*, December 20, 1935.

its provisions as an amendment to the Covenant on the score that it could not agree to any relaxation of the effectiveness of the economic and financial sanctions of Art. 16. But, as was to be expected, the Powers have felt unable to accept the full rigidity of Art. 16, and the Dominions, no less than the United Kingdom, have definitely accepted their view, thus avoiding any breach of unity.

The Position of the British Government.—The British Government, inevitably perhaps, had in conjunction with France a duty which it could not share with the Dominions in suggesting terms of pacification to the League and to the Powers concerned. It might have been hoped that the British Government would have succeeded in securing the association with it in the discussions of the Dominion representatives, so that there might have been a revival in so grave a crisis of that unity in diversity which marked the proceedings of the Peace Conference, when, despite their distinct representation, all the parts of the Empire collaborated in vital issues, a unity repeated at the Washington Conference of 1921-2. But it is easy to see that the British Government might well feel that such association would hamper too greatly its action, while the Dominions would be reluctant to accord to their representatives in London at the time any power of binding them. Yet it is difficult to suppose, to judge from the reactions in the Dominions, that Dominion representatives would have permitted the British Government to fall into the grave error of proposing peace terms which were so deeply resented by public opinion. Their participation also would have prevented the error of agreement by the Secretary of State for Foreign Affairs to the French Government's plan without prior Cabinet sanction. The resignation of the Minister, as in the case of that of the Secretary of State for India on the Mesopotamian issue, is in the essential British constitutional tradition, illustrating the rule that a Minister who commits a grave error of judgment involving the public confidence in the governmental policy should resign office. On the other hand, the episode is a marked triumph for the section of opinion which deprecates the method of personal diplomacy as incompatible with the due consideration of vital issues. The criticism of the action of the Cabinet in remaining in office and sacrificing the Foreign Secretary, though natural, is not constitutionally valid; it is plain that its assent to the plan was largely motivated by the desire not to throw overboard a colleague in ill health, and the Prime Minister admitted error and accepted an amendment to the opposition vote of disapproval which commits the Ministry to a policy forbidding any further deviation from League principles, the promise of fidelity to which secured the Government its convincing majority at the General Election. The proceedings illustrate further the commanding position in his Ministry claimed and exercised by Mr. Baldwin, and the power of public opinion when really excited to compel even the strongest Ministry to yield to it, as well as the surprising divorce which existed between the Cabinet and the electorate in their appreciation of the subject-matter. A regrettable feature of

the discussion was the attempt to throw responsibility on a permanent official, a matter properly discouraged by the Government.

The Legalization of Sanctions.—Somewhat unexpectedly, perhaps, the British Government has accepted the view that it can carry out sanctions under the terms of the Treaty of Peace Act, 1919. It must be owned that this is a very far-reaching claim of right. To hold that all steps which the government of the day deems proper to give effect to the sanctions clauses of the Covenant of the League of Nations are covered by the power to issue orders to give effect to the Treaty of Versailles may be held to be a serious expansion of the power accorded in 1919 beyond its normal extension. It is true that, when the legislation of Newfoundland was overridden by Order in Council in 1907, action was based on a very old statute, that of 1819,¹ but that Act was passed for the express purpose of securing the carrying out of the Treaty of 1818 with the United States, and it was employed simply and solely for that express purpose. The present case is very different, and it is extremely dubious whether Parliament in 1919 had any idea that it was placing in the hands of the executive an unfettered power to sever all relations with a foreign government and people.² Moreover, there is a distinct legal difficulty. The Order in Council first passed includes provisions making it illegal for one British subject in the United Kingdom to procure a loan for another in Italy. Now the terms of the Covenant refer to the termination of relations between British subjects and subjects of the Power against which sanctions are being applied, but are silent on relations between British subjects in this country and in the territory of the offending State. This provision is doubtless unsatisfactory, and it has been proposed to amend the Covenant³ so as to adopt the British doctrine which affects with enemy character for trade purposes British subjects resident in an enemy country, but that amendment has never been passed. It seems very doubtful, therefore, whether the Crown in Council has power to penalize action in such cases. On constitutional grounds, and having regard to the right of the Upper Chamber to a voice in these issues, it would have been preferable to deal with the matter by an Act *ad hoc*. This course, inevitably, has been adopted in the Dominions. One point of great importance is now clear. Aggression does not result in the existence automatically of a state of war between the Power which violates the Covenant and this country. If it did so, in the view of the British Government, then all trade with Italy would at once have become illegal. There is no reason to regret the result reached.⁴

The Irish Free State and the League.—The attitude of Mr. de Valera in the Ethiopian question has undoubtedly improved the standing of his country and his Government. At Geneva he seconded effectively the

¹ Keith, *Speeches and Documents on Colonial Policy*, ii. 167–81.

² This does not appear to have been discussed in Parliament when the Act was passed.

³ Wheaton, *International Law* (ed. Keith), ii. 1223.

⁴ *Ibid.*, ii. 1129.

movement to place firmly upon Italy the onus of aggression contrary to the terms of the Covenant, and refused to act on the suggestion, unwisely made by leading members of the opposition, that he should have made his support of the British position conditional on a settlement of the dispute between the Free State and the United Kingdom. Very properly he defended his position in the Dail by insisting that the Free State had freely joined the League of Nations, and that it was under a clear obligation to give effect to its obligations under the Covenant, which had nothing to do with Irish and British relations; if Britain were moving in the proper direction, he had no objection to keeping in step. The secession of Mr. Macdermot from his association with the opposition leaders shows that the President's action has been widely approved outside the ranks of his own party. He was also successful in inducing the party conference at its annual session to refuse to accept a motion urging that the League of Nations should be asked to recognize the independence of the Free State on the threat of secession if this request were not accorded. He stressed the fact that the League could not be expected to take up an issue between two members where no threat of hostilities was in question. The bearing of his attitude to the League on the dispute with Britain is clear; the State is prepared loyally to honour any obligation freely undertaken, and to secure, if British forces are removed, that no hostile use shall ever be made of her territory by enemies of the Crown.

The Abolition of the Senate.—The final decision of Mr. de Valera to carry by the deadlock procedure the Bill to abolish the Senate was not surprising. It is clear that he has adopted the view that the dangers to be feared from a single chamber form of government are not of great importance, and that the introduction of another stage in procedure in the Dail will suffice to afford an opportunity for those improvements of Bills on second thoughts which have hitherto been effected in the Senate. The grounds on which abolition has been determined are simple; the Senate, in the opinion of the Government, which Mr. Macdermot shares, has acted without due impartiality. It is impossible to deny the truth of the accusation. The Constitution unquestionably assumed that the Senate would be a body in some degree representative of the mature wisdom of the land; in fact, it has never shown itself anything but a replica in partisanship of the Lower House. The most serious blunder which it committed was undoubtedly the assent given to the Constitution (Amendment No. 17) Act, 1931. That measure was a dangerous inroad on the security of personal liberty,¹ and it should have been drastically revised by the Upper Chamber, if not rejected outright. It was, however, passed under the impression that it could be used to strengthen the position of the then Government. It failed in its operation, and all criticism of its employment by Mr. de Valera has been gravely weakened by the fact that it was enacted by his predecessors. In addition, the

¹ See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. i, pp. 111, 112. Cf. *The State (O'Duffy) v. Bennett*, [1935] I.R. 70, at pp. 97 ff., *per* Hanna J.

Senate undoubtedly showed no discretion in its treatment of Mr. de Valera's Bills, in special that dealing with the wearing of uniforms which struck at a plain and obvious evil. Moreover, the opposition was hopelessly handicapped in its fight to preserve the Senate by the fact that it itself had swept away the safeguard of the referendum under Art. 47 of the Constitution. Mr. de Valera had clearly a mandate from the electors at the last election to secure abolition. The position, however, in which he will be placed by the abolition of any check on legislation is not wholly easy in view of the suggestions made both by himself and Mr. Lemass that all non-republican elements in the Constitution must be abolished. A Bill to this effect can easily be passed in the Dail, but the issue of its legal validity will remain. The Privy Council¹ has asserted that the Dail can legislate in any manner irrespective of the treaty; all three members of the Supreme Court, however, have declared that the treaty is the supreme law of the land as provided by the Constituent Assembly² whence in their view they derive their power and the Dail its existence. The Privy Council judgment is of no binding effect on the courts of the Free State, which alone can declare the law of the Irish Constitution. Mr. de Valera may, therefore, well doubt whether he can rely on the court as at present constituted to uphold legislation incompatible with the treaty. But it would not be difficult to add to the numbers of the court, which in any case is undermanned, and there is the classic precedent of the United States to justify the view that the legislature can use its power to add to the strength of a court, if it is necessary in this way to give effect to the national will. The fundamental difficulty, however, is afforded by Northern Ireland. Mr. de Valera doubts the moral right of a minority to determine its own political position, but he realizes that declaration of republican status must be restricted, if now passed, to the area of the Free State, and that it would permanently act as a serious if not hopeless obstacle to Irish reunion.

The Appeal to the Privy Council.—The inevitable discussion in the Union Parliament of the desirability of abolishing the appeal to the Privy Council revealed the unwillingness of the Government to take up this issue at present, in view, no doubt, of the desire to prevent any further strain on the unity of the coalition. But a very significant objection to the appeal which is widely shared was pointed out by Mr. Blackwell, who deprecated any idea of its abrogation for constitutional cases. He stressed the fact that appeals in ordinary commercial causes such as that of the *Pearl Assurance Co. v. Government of the Union*³ were open to objection, especially as that case, in his view, illustrated the doctrine that the Privy Council was not bound, as was the House of Lords, by its own earlier

¹ *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. iv, pp. 271, 272.

² *The State (Ryan and Others) v. Lennon and Others*, [1935] I.R. 170. The Privy Council seems not to have realized that this decision shows all the justices agreed on the principle of the supremacy of the Constitution.

³ [1934] A.C. 570; Keith, *Letters on Imperial Relations*, 1916-35, p. 353.

decisions. It is not necessary to share the latter part of his doctrine, but there is much force in the opinion that the sporadic carrying of points of ordinary law to the Privy Council serves no useful purpose, and that the appeal should be reserved for constitutional issues, internal or inter-imperial in character. The same view has naturally been expressed in certain quarters in Canada on the hearing by the Judicial Committee of the appeal of Mrs. Cora McPherson against the decision of the Alberta Court of Appeal that the divorce proceedings successfully conducted against her by her husband were valid, despite the fact that they took place in a library and not in a normal open court-room. It is not surprising that the Committee ultimately held¹ that neither on principle nor on authority could it be held that the irregularity operated to render the supervening decrees null and void. But it is difficult to understand how the Privy Council consented to go into the merits of the issue. After all, when once the Supreme Court of Canada came into being, it was proper that normally to it should fall the final decision of all issues not of a constitutional nature, and to hear other causes involving private law questions seems opposed to sound principle. The way is now open to the Provinces and the Federation to consider carefully whether the appeal should not be limited to causes which raise constitutional issues, on which it is generally agreed in the Dominion it is still desirable to have the judgment of an impartial outside tribunal. The value of the Privy Council in such issues stands undisputed, and from it must come the final pronouncement on the validity of the legislation enacted under the auspices of the late Government of the Dominion invading, under the authority of the treaty power or that of general legislation, the control hitherto exercised by the Provinces in the field of regulation of industrial conditions.

Uniformity in Interpretation of Legislation.—There is, however, one set of cases of a non-constitutional character in regard to which the power of the Privy Council to give rulings which can be accepted throughout the Empire may be desirable. Where a statute on commercial law has been adopted generally, as in the case of the Sale of Goods Act, it is clearly undesirable that it should be interpreted in varying ways in the different parts of the Empire. It is, for instance, most satisfactory that the Judicial Committee² has been able to restore the judgment of the Supreme Court of South Australia awarding damages in contract under exceptions (1) and (2) of s. 14 of the Act against the retailers, and in tort against the manufacturers, of woollen underwear in which a chemical irritant had negligently been allowed to remain, with the result that the purchaser contracted dermatitis. The majority judgment of the High Court, had it stood, would have created confusion and difficulty throughout the Commonwealth, and as regards the duty of manufacturers it failed to give due weight to the doctrine laid down by the House of Lords

¹ Judgment delivered December 16, 1935.

² *Grant v. Australian Knitting Mills Ltd.*, 52 T.L.R. 38.

in *McAlister or Donoghue v. Stevenson*,¹ which the Privy Council applied and which the High Court had itself admitted to be relevant. In any limitation of appeals it would probably be wise to reserve to the Dominion court the right to grant special leave in such cases.

The Liberty of the Subject.—Of very wide interest is the decision of the Divisional Court in *Duncan v. Jones*,² which establishes the validity of the conviction of a lady for obstruction of the police, her offence consisting in attempting to address a meeting held in a *cul-de-sac* after being told by the police that a meeting could not be held there, though it might be held at a place 175 yards distant. The ground of the unanimous decision of the court was that it is the duty of a police officer to prevent an apprehended breach of the peace, and that, if he reasonably apprehends a breach as the result of an event, it is his duty to prevent the occurrence of that event, and, if he is obstructed in his action, he is wilfully obstructed in the execution of his duty. The importance of the decision lies in the fact that it was not suggested that Mrs. Duncan or any of the persons present at the meeting either committed, incited, or provoked a breach of the peace. It appeared, however, that the place of meeting was opposite a training centre and that a disturbance had taken place there at a meeting held over fourteen months earlier after an address by the lady, that the superintendent of the centre had intimated to the police his fear of a breach of the peace if the lady again addressed a meeting at that place, and that the police genuinely apprehended such a breach, the topic announced for the meeting being sedition. It is important to note that Lord Hewart carefully pointed out that, as presented, the case raised no issue of the unlawfulness of an assembly because of the expectation of breach of the peace caused by opponents of the holders of the meeting, and that, while referring to the case of *Beatty v. Gillbanks*³ as somewhat unsatisfactory, he held that it stood apart from the present case, which was more akin to that contemplated by Baron Bramwell in *Reg. v. Prebble*,⁴ where he admitted the right of a police officer to remove persons from an inn when he had reason to suspect breach of the peace. The case, therefore, establishes nothing essentially new, and the offer of the police to permit the holding of the meeting in a more suitable place renders it hard to defend the action of the speaker.

The Law governing Crown Liabilities in Loans.—The decision in *International Trustee for Protection of Bondholders Aktiengesellschaft v. The King*⁵ is important as a definite pronouncement that the law governing a loan contracted in the United States by the British Crown must be deemed to be governed by English law. The ground given is that it cannot be assumed that a foreign sovereign will allow any claim in respect of a loan to be litigated against him save in his own courts; if, then, he permits such litigation, it must be assumed that the position is analogous to the case in which a contract provides a stipulation that the parties

¹ [1932] A.C. 562.

² 52 T.L.R. 26.

³ 9 Q.B.D. 308.

⁴ 1 F. & F. 325.

⁵ 52 T.L.R. 82.

agree to accept the jurisdiction of the courts of some particular country, whence it may be held, as in *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega*,¹ that the law of that country is intended to be the proper law. It must be noted that the doctrine is difficult of application to the case of Dominion loans floated in the United Kingdom and admitted to trustee rank, for it seems to be assumed that such loans can be made the subject of judicial proceedings in English courts. The judgment is also important in its recognition of the limitations of the exemptions enjoyed in foreign states by sovereigns or diplomats. It is not that foreign law does not apply to their transactions, but that they are not amenable to process locally. The same doctrine was enunciated by the United States Secretary of State to the Persian Minister when apologizing for his arrest for exceeding the speed limit on November 27, 1935.²

The Contractual Power of the Crown.—The decision of the High Court of the Commonwealth of Australia in *New South Wales v. Bardolph*³ clears up certain doubts which had been created in Australia by earlier decisions regarding the power of the Crown to enter into contractual obligations without express parliamentary authority in the shape of an appropriation for the purposes of the contract. The case was brought against the State of New South Wales under s. 58 of the Judiciary Act, 1903-33, which authorizes the High Court to deal with claims against a State by a resident in another State. The issue arose from the cancellation by the new Government of New South Wales of a contract which had been given to a newspaper proprietor for advertisements relating to a tourists' bureau. The contract, which was for a period which affected more than one financial year, had no express legislative authority, nor was it sanctioned or approved by any Order in Council or executive minute. On the other hand, in the Supply Acts and Appropriation Acts for the financial years affected provision was made under the heading "Government Advertising" for the expenditure of sums much larger in amount than the amount involved in the contract. The newspaper proprietor ignored the cancellation of his contract, carried out the advertising order given by Mr. Lang, and at the close of the period brought the action. It was held by Evatt J. that the contract was validly entered into by responsible Ministers of the Crown, and was not suspended pending the time when moneys should be made available by Parliament to carry out the contract; that it was enforceable against the State subject to Parliament making moneys available to discharge liabilities under it; and that in fact money had been made duly available either by virtue of the Audit Act, various Supply Acts, and an Appropriation Act, or under s. 3 of the Special Deposits (Industrial Undertakings) Act,

¹ [1902] 2 K.B. 384, at p. 393.

² The Minister was shortly after recalled. *The Times*, January 6, 1936; cf. Keith, *Letters on Imperial Relations*, 1916-1935, pp. 333, 334.

³ 52 C.L.R. 455.

which operates as a permanent appropriation of the receipts of an undertaking to the purpose of meeting its working expenses. The decision is interesting in that it negatives the view that a contract made by the Crown is invalidated by absence of a parliamentary grant. The Crown's capacity to enter into contracts enables it to make a contract upon which suit may be brought, although it will rest with Parliament to provide the funds necessary to pay it. But it is not necessary that detailed reference should be made in Appropriation Acts to the particular contract; a general authority suffices. Moreover, it is not necessary that there should be an Appropriation Act,¹ for Supply Acts in their modern form are also Appropriation Acts, so far as they extend. The decision of Evatt J. was approved by all the other members of the High Court on Appeal; the judgment of Dixon J. is of special value, as it deals fully with all the earlier cases.² He emphasizes, in addition, the rule that it is no answer to a suit against a State on a contract that the moneys necessary to meet the liability have not been provided by Parliament. On the other hand, this does not mean that, if Parliament has, by an expression of its will in a form of which the court is bound to take notice, refused to provide funds for the purpose of the contract, it remains actionable under the Judiciary Act. This qualification is clearly necessary, for an unlimited liability would destroy the dependence of the executive upon parliamentary appropriation. Even as it is, the judgment goes far in recognizing the contractual power of the executive, and may possibly require to be limited in later examination.

The Extent of the Defence Power of the Commonwealth.—A most interesting discussion of the extent of the defence power of the Commonwealth is afforded in *Attorney-General for Victoria v. The Commonwealth*.³ The Commonwealth Government, under the Defence Act, 1903-32, established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and uniforms for postal employees. In peace time the operations of the factory included the supply of uniforms for other Commonwealth departments, and also for State officers and employees in various public institutions, and for some private persons. The Victorian Chamber of Manufactures procured intervention by the Attorney-General for the State, seeking a declaration that such operation of the factory was *ultra vires* the Commonwealth. The defence alleged that the justification for the extension of the operations of the factory was the necessity in the interests of the

¹ It negatives the suggestion of Durell, *Parliamentary Grants*, p. 35, that all grants made are nullified by prorogation or dissolution before an Appropriation Act is passed, a view based by Hearn, *Government of England*, p. 370, on the Victorian case, *Alcock v. Fergie*, (1867) 4 W.W. & a'B. (L.) 285.

² *Churchward v. The Queen*, (1865) L.R. 1 Q.B. 173; *Commercial Cable Co. v. Govt. of Newfoundland*, [1916] 2 A.C. 610, 617; *Commonwealth v. Colonial Combing, etc., Co.*, (1922) 31 C.L.R. 421, must be read in the light of *Att.-Gen. v. Great Southern and Western Railway Co. of Ireland*, [1925] A.C. 754, 771, 772.

³ (1935) 52 C.L.R. 533.

defence of the Commonwealth to maintain intact the trained complement of the factory in order to meet war-time demands. The court had no difficulty in holding that the Attorney-General of a State had a sufficient title to invoke a provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation extending to the State, and that the action was properly brought in his name. It was also agreed by the majority of the court that the Commonwealth plea was adequate in so far as it rested on the defence power, the sales of clothing to bodies outside the regular naval and military forces being incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm, a matter in which much must be left to the discretion of the Governor-General and responsible Ministers. It was pointed out that the case of *The Commonwealth v. Australian Commonwealth Shipping Board*,¹ on which the plaintiff relied, was not conclusive of the issue, for the decision of the court merely asserted that the defence power did not authorize the establishment of businesses for the purpose of trade wholly unconnected with any purpose of naval or military defence. The grounds of this decision rendered it unnecessary for the court to discuss the grave question involved in the argument that s. 81 of the Constitution itself enabled the Commonwealth to appropriate moneys for any purpose deemed sufficient by the Commonwealth, quite irrespective of its relation to the legislative or the executive authority conferred upon Commonwealth organs by other sections of the Constitution. It will be remembered that this issue has been raised in the United States,² and that, if it were decided affirmatively, the authority of the Commonwealth might be substantially extended at the cost of the States. Rich J., who accepted the validity of the action of the Commonwealth, gave the warning that in all cases where incidental powers were relied upon there is a danger of the cart being harnessed before the horse. Starke J. accepted the power of the Commonwealth under the defence power to set up a factory to manufacture naval and military uniforms, and he admitted the right of the Commonwealth, even without statutory enactment, to employ the factory for the manufacture of other requirements for the Commonwealth. But he denied that the power of the Commonwealth extended to manufacture for the States, or public bodies constituted under State law, or for private individuals. The executive power, he admitted, might not be limited to matters connected with the departments actually transferred or matters upon which the Commonwealth has power to make laws.³ He expressly dissented from the contention that s. 81 of the Constitution permitted appropriation for any purposes which the Commonwealth thought fit, the power, in his opinion, being restricted to subjects assigned to or departments or matters placed under the control

¹ (1926) 39 C.L.R. 1.

² *Massachusetts v. Mellon*, (1923) 262 U.S. 447, and the decisions affecting the "New Deal" of January 6, 1936.

³ He cited Keith, *Responsible Government* (ed. 1912), ii. 809 (p. 567).

of the Federal Government by the Constitution. He rejected also the argument that the extra clothing might be regarded as surplus stock which the Commonwealth could dispose of at its discretion. By such means all constitutional checks might be avoided, and the position of the States under the Constitution gravely compromised. There is, of course, great force in these contentions, and the decision of the majority of the court is clearly justified most satisfactorily by treating the manufacture for civil purposes as a mere incident.

Freedom of Trade in Australia.—In *Tasmania v. Victoria*¹ there was in dispute the very important issue of the power of a State to protect itself from the introduction into its limits of trees, plants or vegetables which in the opinion of the Governor in Council are likely to introduce disease or insects. Under the Vegetation and Vine Diseases Act, 1928, of Victoria, power to prevent entry was given to the Governor in Council, and it was exercised against the introduction of potatoes from Tasmania. The validity of the action was questioned by Tasmania, the Attorney-General being added as a plaintiff, and the respondent being the State of Victoria and the Minister for Agriculture. The majority of the court were agreed that the action was properly brought by the Attorney-General; Starke J. concurred also in this view, but restricted his approval to the extent to which the Attorney-General's case rested on the allegation that Victoria had committed a breach of the Constitution, as opposed to his further allegation that the action of the Government was not authorized by the Victorian Act. This ground of deciding against Victoria was adopted by Gavan Duffy C.J., Evatt and McTiernan JJ. But the essential reason for holding Victoria in the wrong, in which Rich and Dixon JJ. concurred with their colleagues, as against Starke J., was that the proclamation of the Governor in Council contravened s. 92 of the Constitution, which provides for freedom of trade, commerce and intercourse amongst the States. The view of Gavan Duffy C.J., Evatt and McTiernan JJ. was that the effect of the proclamation was nothing less than to terminate indefinitely that species of trade among the States which consisted of the marketing by Tasmanians of their potatoes within the State of Victoria. They expressed no opinion on the precise degree to which a State might protect its citizens against the introduction of disease, but were satisfied that the relation between the introduction of potatoes from Tasmania into Victoria and the spread of disease in the latter was, on the face of the Act and the proclamation, too remote to warrant absolute prohibition. It was pointed out that the decision in *Ex parte Nelson* (No. 1)² was distinguishable, for the action there taken did not prohibit all trade in cattle from Queensland into New South Wales, but merely regulated the method in which trade was to be carried on, and action was only permitted to the executive when there was reason to believe that there existed a disease in the stock in the State of origin. It was further pointed out that the Victorian legislation could not be

¹ (1935) 52 C.L.R. 157.

² (1928) 42 C.L.R. 209.

justified under the power of the States under s. 112 of the Constitution to pass inspection laws, for the Act merely provided for prohibition, and it was admitted for the purpose of the case that the introduction of disease could have been guarded against by inspection without prohibition. Rich J. also held the proclamation invalid as a penalization of interstate commerce. He intimated that the decision of the court in *Ex parte Nelson*, having been given upon an equal division of opinion, was not a precedent binding on the court in subsequent cases. The same view on this point was taken by Dixon J. The latter also held that the action of Victoria was a clear violation of s. 92 of the Constitution, and he expressed agreement with the view of Brett M.R. in *The Vera Cruz*¹ that, when a court is equally divided, if the case comes before it again, it will exercise an independent opinion, the rule to the contrary in the House of Lords being based on the special view taken by that House of the conclusiveness and finality of its rulings. This is an interesting example of a divergence of practice between the High Court and the House of Lords. Starke J., on the other hand, was of opinion that the Victorian Act did not contravene s. 92 of the Constitution, holding that the Act was not an interference with the freedom of inter-State trade, but was a legitimate exclusion of diseased plants for the protection of the State, relying in part on remarks made by the Privy Council in *James v. Cowan*.²

Regulation of Inter-State Transport.—The same issue of freedom of trade arose in *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (New South Wales)*.³ The State Transport (Co-ordination) Act, 1931, of New South Wales provided for the licensing of motor vehicles, but the company in question sent goods by its vehicles from its Melbourne warehouse to its branches in New South Wales for the purpose of sale without obtaining a licence. The Commissioner under the Act thereupon imposed on the company a charge based on the tonnage of the vehicles and the mileage travelled. It was contended that this charge contravened s. 92 of the Constitution. This contention was overruled by the majority of the court, Gavan Duffy C.J., Rich, Evatt and McTiernan JJ., and they held also that the charge made was not a customs duty, and therefore did not infringe s. 90 of the Constitution. The majority held that the case was definitely covered by the decisions in *Willard v. Rawson*⁴ and *R. v. Vizzard, ex parte Hill*.⁵ In the former case it was held that a State enactment forbidding the use of motor vehicles for public highways except upon conditions which included a substantial payment to the Treasury, was applied validly to the use of motor trucks for the purpose of inter-State transportation of goods. In the latter case, under the same Statute as was involved in *Gilpin's case*,⁶

¹ (1884) 9 P.D. 96, 98.

³ (1935) 52 C.L.R. 189.

⁵ (1933) 50 C.L.R. 30.

² [1932] A.C. 542.

⁴ (1933) 48 C.L.R. 316.

⁶ *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)*, (1935) 52 C.L.R. 189.

carriers for reward who conveyed merchandise between a place in Victoria and a place in New South Wales were held to have been rightly convicted of operating in New South Wales a public motor vehicle not licensed by the Board. The essential point in the view of the justices was that the Statute was an attempt not to suppress but to regulate transportation in such a way as to help rather than to retard the movement of commercial goods throughout New South Wales. Absolute freedom of trade did not mean that a resident of one State might transport goods or travel to a place in another State in whatever vehicle, or by whatever route, or at whatever time, or at whatever speed he might choose, and a law which imposed a limitation on his choice was not necessarily inconsistent with s. 92 of the Constitution. Starke J. dissented on the grounds which he had expressed already in *R. v. Vizzard*, and Dixon J.¹ delivered an elaborate judgment in which he reviewed all the relevant cases and held that s. 92 was inconsistent with the Act impugned. He admitted that traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibitions of fraudulent descriptions upon goods, and provision for the safe carriage of dangerous things would not impair freedom of commerce. But, given an act or transaction, falling within the conception of trade, commerce or intercourse among the States and a restriction or burden operating upon that act or transaction, it must be an infringement upon the absolute freedom guaranteed by s. 92 unless the restriction or burden was imposed by virtue of, or in reference to, none of the essential qualities connoted by the description trade, commerce and intercourse among the States. On this principle could be explained the decision in *R. v. Smithers*,² which held invalid a law forbidding a person in certain cases of conviction of crime to enter another State within three years, that in *Foggitt, Jones & Co. v. New South Wales*,³ and that in *Duncan v. Queensland*,⁴ the meat cases, where it was attempted to prohibit sale of meat between the States. Similarly in *W. & A. McArthur v. Queensland*⁵ it was ruled that the prohibition of the sale of commodities at prices above those fixed by the Government was properly regarded as open to the objection that the restriction on the sale of the commodity within the State might operate to obstruct exportation from the neighbouring State. So in *The Commonwealth v. South Australia*⁶ a tax upon the sale of motor spirit was levied upon the importer, thus making introduction into the State the ground of the burden. In *James v. South Australia*⁷ the State legislation prescribed the maximum amount to be sold within Australia, thus restricting disposal of fruit out of the State into the other five States. In *James v. Cowan*⁸ the power of compulsory acquisition of dried fruit involved an attempt to restrain the sale of a commodity into other States and so

¹ Pp. 202-12.

³ (1916) 21 C.L.R. 357.

⁵ (1920) 28 C.L.R. 530.

⁷ (1927) 40 C.L.R. 1.

² (1912) 16 C.L.R. 99.

⁴ (1916) 22 C.L.R. 556.

⁶ (1926) 38 C.L.R. 408.

⁸ (1930) 43 C.L.R. 386; [1932] A.C. 542.

violated s. 92. In *Peanut Board v. Rockhampton Harbour Board*¹ a compulsory system of collective marketing was held not to authorize the prevention of a grower exporting his commodity to another State. In his view, therefore, the decisions in *Willard v. Rawson* and *R. v. Vizzard* were not sound, while those in the *Vacuum Oil Co. Pty. Ltd. v. Queensland*² and *Tasmania v. Victoria*³ were sound. The object of s. 92 was to enable individuals to conduct their commercial dealings and personal intercourse independently of State boundaries, and the protection accorded applied not merely to direct interference of inter-State trade, commerce and intercourse, but also to indirect intervention.

The same issue as in the *Gilpin* case arose on the Road and Railway Transport Acts, 1930-31, of South Australia, and the case⁴ was decided in the same sense by the majority of the High Court, Starke and Dixon J.J. again dissenting, the latter adding that much might be said for the view that discrimination had been practised against road traffic between Broken Hill and Adelaide.

The Nature of Taxation.—In the case above mentioned of the *Vacuum Oil Co. Pty. Ltd. v. Queensland*,⁵ in addition to the operation of s. 92 there was involved the discussion of s. 90 of the Constitution. The State Act, the Motor Spirit Vendors Act, 1933, forbade the sale for delivery in Queensland by any principal or agent in Queensland of any motor spirit situate at the time of sale in Queensland, unless he was a holder of a licence under the Act. Holders of licences were bound to purchase at a prescribed rate a quantity of power alcohol manufactured in Australia, bearing a prescribed proportion to the quantity of motor spirit sold by them. Persons purchasing from the holder of the licence were exempted from the obligations of the Act. The whole of the court held that the Act did not impose a duty of customs, nor a duty of excise, nor did it grant a bounty on the production of power alcohol. But it was held by the justices, except Starke J., that the Act offended against s. 92. Evatt J. pointed out that the Act substituted for the free sale in Queensland of a New South Wales commodity, a completely inconsistent economic doctrine, directly restricting every sale by requiring the purchase of a proportionate quantity of a Queensland product. Moreover, this was so, despite the fact that the motor spirit was produced overseas and that the part played by New South Wales consisted in transferring the spirit into containers from oil tankers and the filling of drums in Sydney from these containers prior to transport. Starke J.'s disagreement was based on the fact that in his view the Act struck only when importation into Queensland had stopped and the motor spirit had been absorbed in local stocks for intra-State distribution. In any case, in his view, the Act should have been declared invalid only in so far as it struck at inter-State trade.

¹ (1933) 48 C.L.R. 266.

² (1935) 52 C.L.R. 157.

³ (1934) 51 C.L.R. 108.

⁴ *Bessell v. Dayman*, (1935) 52 C.L.R. 215.

⁵ (1934) 51 C.L.R. 108.

The Application of s. 92 to the Commonwealth.—A curious position arose in *James v. The Commonwealth*,¹ another form of a well-known litigation. The plaintiff, who carried on the business of selling dried fruit inter-State, brought an action against the Commonwealth for the purpose of having the Dried Fruits Act, 1928–35, declared invalid as being inconsistent with s. 92 of the Constitution which, he claimed, bound the Commonwealth as well as the State. The defendant urged that the action should be dismissed as vexatious and oppressive on the ground that the question raised in the action had previously been litigated between the same parties in *James v. The Commonwealth*,² and decided against the plaintiff. But this claim was not allowed, the court holding that the action was not vexatious, as in the prior case the court, though it ruled that s. 92 did not bind the Commonwealth, decided the case in the plaintiff's favour on other grounds. But the court also held, however, that s. 92 did not bind the Commonwealth. Rich J. pointed out that the majority of the members of the court in *McArthur's case*³ adopted the view that the Commonwealth legislative power was not affected by the provisions of s. 92. In *James v. The Commonwealth* the opinion expressed in *McArthur's case* was followed, but the decision of the question was not necessary for the termination of the case. The Commonwealth, it was true, had shown no anxiety to make use of its alleged freedom, and in *Vizzard's case*⁴ had actually argued that the Commonwealth should be held to be bound. But it was desirable, when the court had adopted an interpretation, that it should not depart from it, and it would be better that the matter should be decided on appeal by the Privy Council, in such a case no certificate under s. 74 of the Constitution being required for the bringing of such an appeal. Starke J., while admitting the right of the court to reconsider its decisions, and while it had done so in exceptional cases, *e.g.* where the decisions of the court were in opposition to the principles laid down by the Judicial Committee or to the decisions of the Court of Appeal, or to its own decisions, held that the case had been acted upon for so long that the court should now treat the law as settled. The matter had been argued at length in *Vizzard's case*, but the rule laid down in *McArthur's case*⁵ had been maintained, despite the opinion to the contrary of the Chief Justice and Evatt and McTiernan JJ. Dixon J. intimated that he did not feel satisfied that s. 92 did not bind the Commonwealth, but he thought that the earlier decisions should be regarded as binding, especially as the rule had been assumed to be valid in the cases of *Huddart Parker, Ltd. v. The Commonwealth*⁶ and *Victorian Stevedoring, etc. Co. v. Dignan*.⁷ Evatt and McTiernan JJ. insisted that there had been no doubt in the Commonwealth prior to 1920 that s. 92 bound the Commonwealth, and that then Gavan Duffy J. had dissented

¹ (1935) 52 C.L.R. 570.² (1928) 41 C.L.R. 442.³ (1920) 28 C.L.R. 530.⁴ (1933) 50 C.L.R. 30.⁵ (1920) 28 C.L.R. 530.⁶ (1931) 44 C.L.R. 492.⁷ (1931) 46 C.L.R. 73.

from the views of Knox C.J., Isaacs and Starke JJ. These justices had assumed that s. 92, if it applied to the Commonwealth, would render impossible such measures as the Australian Industries Preservation Act, the Secret Commissions Act, the Sea Carriage of Goods Act, and exclusive provisions in the Post and Telegraph Act, so far as they related to inter-State transactions. It was pointed out that this view was mistaken, and that s. 92 really bound all parties within the Commonwealth, including the Commonwealth itself. But it would be preferable to leave the matter to the decision of the Privy Council, to which it was understood the case would be carried and which had made it clear that as far as it was concerned the question must be considered an open one.¹ No more suitable case for the aid of that body can easily be imagined.

¹ *James v. Cowan*, [1932] A.C. 542.

NOTES.

The Marquess of Reading.—The first Lord Reading will occupy a distinguished place in the legal and political history of this country. To those of his own race his brilliant and romantic career cannot but be a source of pride of a special kind, but all his fellow countrymen will be united with them in doing him honour. That such a career should have been possible for him in England is for us all a ground of deep satisfaction.

His record of public service, pursued as it was with such eminent ability, has been the subject of many obituary notices. He died, full of years and honours. Sharing in the sense of national loss, we as a Society have also a private reason for regret. For very many years he has been one of our members, and in 1929 he succeeded Lord Rosebery as our President, thus marking in a striking manner his appreciation of and interest in the work of the Society.

It is therefore peculiarly fitting that we should pay homage to his memory and record our sense of his high value as a lawyer, as a judge, and as an administrator and public servant.

The Second Congress of Comparative Law.—The outstanding success of the Congress of Comparative Law held in 1932¹ has encouraged its promoters, the Academy of Comparative Law, to organize a second Congress to be held on the invitation of the Government of the Netherlands in the Peace Palace at The Hague, from July 26 to August 1, 1937. Professor Balogh and his coadjutors are already busily engaged in making preparation, and the last session of the Academy, held in July of last year, was mainly devoted to considering and settling a programme of subjects for discussion.

At the request of the Academy we are glad to publish the programme thus arranged, and to invite all who desire to co-operate to communicate with Professor E. Balogh at 151 bis, rue Saint Jacques, Paris V°.

PROGRAMME.

SECTION I (GENERAL).

A. *Legal History.*—1. Roman theory of contractual liability. 2. The Roman theory of abuse of rights. 3. The notion of the just price and the theory of "laesio enormis" (origin and comparative history). 4. The interaction of Roman and Anglo-Saxon law.

¹ *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 244 ff.

B. *Ecclesiastical Law*.—1. Social ideas in the *Codex iuris canonici*. 2. The legal effects of betrothal according to the *Codex iuris canonici* and other modern systems of law.

C. *Legal Ethnology*.—1. Indo-European family communities. 2. The origin and development of collective ownership. 3. Forms of marriage among Indo-Europeans. 4. Legal folklore.

D. *Oriental Law*.—1. The Western movement in Oriental legal studies. 2. The determination of the spheres of application and the influence of oriental systems of law. 3. The influence of Western legal systems (codes, laws and case law) on oriental legal systems. 4. The influence of Roman law on Mohammedan law. 5. Civil and criminal responsibility in Mohammedan law.

E. *Jurisprudence*.—1. Theory of law : (i) Nature of the State. (ii) Sovereignty. (iii) Nature of law : (a) for the sociologist ; (b) for the political scientist ; (c) for the lawyer ; (d) for the jurist. 2. Legal duties (passive rights, objective theory : Puntschart, Duguit, Lundstedt ; subjective theory : C. K. Allen.). 3. Present trends in public and private law (international law, fiscal law, commercial law, constitutional law, law of succession, administrative law, etc.).

F. *Organization of Legal Studies and Questions relating to Teaching*.—1. The nature (object and end) of comparative law in different countries. 2. Methods of law teaching. 3. The comparative study of legal terminology.

SECTION II.

A. *Civil Law*.—1. General survey of the tendencies of the theory of contracts. 2. Liability for damage done by chattels. 3. Measures taken for the relief of debtors in consequence of the economic crisis (excluding commercial arrangements). 4. The dissolution of marriage, religious as well as civil, by civil courts. 5. General principles of succession on death. 6. Contracts relating to publication. 7. Misuse of the press, wireless telegraphy, cinema, etc., and remedies therefor.

B. *Civil Procedure*.—1. Comparative study of the law of evidence.

SECTION III.

A. *Commercial and Maritime Law*.—1. The influence of changes in the value of money on legal relationships of an international nature. 2. Present tendencies of company law relating to : (a) the protection of minorities ; (b) the rights attached to different classes of shares in a company ; (c) reduction of share capital ; (d) liability of shareholders for each of mismanagement committed at their instigation by directors. 3. Changes in bankruptcy procedure and schemes of arrangement with creditors caused by the economic crisis. 4. A critical examination of the work of the Brussels Conventions of August 25, 1924, and of April 10, 1926, relating to maritime law. 5. The repercussions of " planned economy " on the institutions of private law.

D. Industrial Legislation.—1. The methods of fixing the conditions of labour (legal relations between employers and employees, labour contracts, collective bargains, arbitration, labour courts, etc., etc.).

SECTION IV.

A. Public Law.—1. "Corporatism" in the organization of the modern State. 2. The balance between legislative and executive power. 3. The constitutional and administrative relations between the mother country and: (a) overseas territories that form part of it; (b) mandates and protectorates. 4. The control of the central authority over the activities: (a) of local authorities; (b) of public undertakings. 5. The liability of public services. 6. The legal protection of ancient monuments.

B. Criminal Law and Procedure.—1. The relations between civil and criminal sanctions. 2. The relations between professional judges and juries or assessors. 3. The organization and functions of the public prosecutor. 4. The organization of the reformation and social readaptation of delinquents (reclassement). 5. The maintenance or abandonment of the rule "nulla poena sine lege." 6. Definition and consequences of recidivism.

SECTION V.

1. Documentation in public international law. 2. The individual as a subject of public international law. 3. Different solutions of the problems of multiple nationality in Anglo-American and continental law. 4. The international status of companies formed for gain. 5. The immunities of foreign States engaged in private transactions. 6. The application of international conventions by national law. 7. The status of institutions of public international law in national law. 8. Comparative study of evidence to be received by international courts.

The United States of America's New Departure in Dealing with its Native Indian Population.—The Indian Reorganization Act of June 18, 1934 (Public Act No. 383, 73rd Congress), marks a revolutionary change in the principle and method of treating the native Indian population by the federal government of the United States. I have been asked by Professor W. G. Rice, who contributed a recent article to this *Journal* on "The Position of the American Indian in the Law of the United States,"¹ to add a few words concerning this important enactment.

Until within the last decade the aim of the federal government in dealing with its Indian wards has been to "civilize" them, that is, to inculcate in them the learning, arts and customs of the dominant white civilization about them, and apparently to absorb them as an integral part of that civilization. The Indian's education has been in schools provided by the federal government, where the content and method of education has been similar to that employed for white children, only not

¹ *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. i, pp. 78 ff.

so good. The lands which had been set aside from the public domain as reservations for the various Indian tribes were allotted in severalty to the individual members, with the hope that they would settle thereon and become self-supporting farmers and stock raisers. These allotments were not, however, absolute and unconditional, but the federal government held the legal title in trust for the individual Indian owners, without the latter being able to transfer or incumber the same, until such time as the allottees had supposedly demonstrated their fitness to manage their own affairs, at which time a conveyance in fee simple absolute was made to them. Meanwhile, the federal authority acted as general guardian and protector for the Indians, both as tribes and as individuals. It controlled both tribal and individual property. When an Indian tribe possessed resources of timber, oil or minerals, these were managed by the officials of the Indian Bureau. Individual lands, of which the Indian owners could not make profitable use, were leased by the government and the proceeds paid to the Indian owners as the government directed. In the same manner tribal funds were distributed to the individual members of the tribe, only in such manner as the federal guardian thought best conducive to their welfare. The United States also provided its wards with schools, medical service, roads and police protection.

The results were not entirely happy. Tribal authority and organization waned. Native initiative and pride of race were thwarted. Native virtues vanished, and it was the vices of the whites rather than their virtues which took their place. The government's wards largely ceased to be good Indians, without becoming good members of the white community. When the federal title to individually allotted lands was released the same were promptly sold by the Indian owners and the proceeds squandered. Even as to individual allotments held in trust, the death of an allottee with many heirs often made necessary a sale of the land in order that a partition of the estate might be made among the claimants. The net result was the passage out of Indian hands of a large part of their former wealth and the creation of an increasing number of landless and pauperized Indians. Various private welfare agencies, who in the United States have always maintained a lively interest in the Indian peoples, loudly and vigorously protested.

Although under the regime of President Hoover great advances were made towards a greater intelligence and efficiency in the administration of the government's task of guardianship of its native wards, the administration of President Roosevelt brought a "new deal" to the Indians as well as to the country at large. Mr. John Collier, who had been the most vigorous and well informed of the critics of the government, with a thorough sympathy for what may be termed the Indian viewpoint, was made Indian Commissioner, the administrative head of the United States Indian Bureau. The keystone of the government's new policy is the Indian Reorganization Act. Its principal objectives are two: first, to stop the process of allotment, with the consequent loss of Indian lands;

and second, to grant to the Indians a considerable measure of self-government. According to the commissioner, "it is the impassioned effort to place Indian destiny in Indian hands." Taken together, the effect will be, if the Act is successful, to preserve the Indian tribes as self-governing units, retaining the best of their native culture, art and customs.

The Act itself is short and simple. Further allotments in severalty of tribal lands are prohibited. The trust period on lands already allotted in severalty is indefinitely extended. The surplus lands of an allotted reservation may in the discretion of the Secretary of the Interior be returned to tribal ownership. Descent of restricted allotted lands is according to the law of the state wherein located. An individual allottee may, with the consent of the Secretary of the Interior, sell, devise or transfer his individual lands to the tribe, thus restoring them to common ownership. An appropriation is made for the purpose of acquiring for the tribes such extra lands as are necessary to make them compact and self-sustained units.

The governmental provisions of the Act are particularly simple. "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws."

The Act does not apply to the Indians of Oklahoma, who have long been under the special control of that State, nor to any reservation where the majority of the adult Indians voting at a special election reject it.

During the past year the referendum elections provided for by the Act have been taking place. Of the total of 263 tribes wherein these elections have been held, 174 have accepted the Act. This vote affects an estimated Indian population of something over 132,000. Seventy-three tribes, with an estimated population of 78,415, decided not to come under the Act. This negative vote included, however, the largest Indian tribe, the Navajos of New Mexico and Arizona, with a population of more than 43,000. In the entire vote cast in all tribes, 38,762 votes were cast in favour of the Act, and 23,794 votes against it. The commissioner alleges "that the bulk of the 23,000 adverse votes were cast as a result of an active, well-organized campaign of misrepresentation carried on by selfish interests which feared that the gains of the Indians under the Reorganization Act would be their loss." In justice one must add, however, that the government has been by no means silent in urging upon the

Indians the advantages they would secure by adopting the Act. On July 1, 1935, the Commissioner announced the formation of special units to assist in drafting constitutions, by-laws and articles of incorporation for the tribes desirous of organizing under the provisions of the Reorganization Act.

The Indian Reorganization Act is a bold attempt to direct the course of history of a small but interesting group of people, who in a state of primitive native culture have been all but overwhelmed by advancing Aryan civilization. In appraising the attempt, it must be remembered that it is an effort to reverse a contrary process that has been in operation for over fifty years. It must also not be forgotten that the advancing white population has made it impossible for most Indian groups to maintain the ancient economy on which their primitive culture existed. For those groups who have been for years closely associated with their surrounding white neighbours and have lost most, if not all, of their native culture, coherence and organization, it will be a miracle if the plan succeeds. For those other groups where disintegration has not gone so far it may accomplish much. It will, however, require patience, intelligence and sympathy to carry it to a satisfactory conclusion, but only a cynic can fail to be interested in and hopeful for the federal government's new adventure in its administration of Indian affairs.

RAY A. BROWN,

University of Wisconsin, Madison, Wisconsin, U.S.A.

The Doctrine of Deviation in Modern Maritime Laws.—Merchant ships are not at liberty to take any route they like to their port of destination. Unless otherwise agreed, they have to take the customary one¹ which has replaced the geographical shortest way formerly required.² Leaving this route without good reason is deviation in the legal meaning. Deviation may increase the risk of shipper and insurer, as the new route may be longer or more dangerous, exposing the cargo therefore in a higher degree to the perils of the sea. Diverse legal systems endeavour for that reason to restrict deviation by penalizing in various ways the deviating owner. They are unanimous that he has to compensate the shipper or charterer for damages sustained owing to the deviation, but as they have not adopted the same legal construction, the legal consequences also are not quite the same.

The English doctrine is the most severe. Contracts of shipment are deemed to be made under condition precedent not to deviate.³ An unlawful deviation makes the contract void. This far-reaching effect has, however, been modified by the statement of Collins M.R. in *Joseph Thorley, Ltd. v. Orchis S.S.*⁴ that the effect is to displace the special contract, leaving only such terms of it surviving as may be implied from

¹ *Morrison v. Shaw*, [1916] 2 K.B. 797; *Frenkel v. McAndrew*, [1929] A.C. 559.

² Cf. Lord Esher in *Margetson v. Glynn*, [1892] 1 K.B. 340.

³ *Joseph Thorley Ltd. v. Orchis S.S.*, [1907] 1 K.B. 669.

⁴ *Ibid.* p. 667.

the circumstances and the conduct of the parties by way of a new contract arising out of the old one. This means in practice that the original contract remains valid with exception of the stipulation relating to the owner's liability which is cancelled. As to the liability, the owner's position is then that of a common carrier who is liable in tort to an extent which practically makes him an insurer of the goods in his custody. As he is common carrier from the beginning, the shipper need not prove when the loss or damage has occurred.

Continental systems have reached a similar result by another method of construction. They do not imply a condition precedent, but simply consider the new voyage to be extra-contractual, so that the contract remains valid but does not apply to the new part of the voyage.¹ As no contract has been made relative to that part the owner is under a quasi-contractual obligation therefor. The extra contractual part of the voyage is deemed to be that from the beginning of the deviation to the port of destination.² The French Marine Insurance Law dissents from this view and reaches a result somewhat similar to the English law. The Cour de Cassation has held that for insurance purposes the voyage forms an indivisible unit to which s. 364 Code of Commerce applies. This section provides that the insurer's risk is discharged when the ship leaves her route.³ The insurer therefore is not responsible for any loss or damage occurring at any time during the voyage.

But this doctrine has not been adopted by the French Maritime Law, which, like the German Maritime Law, considers the voyage to be divisible.⁴ In both systems the owner is liable for every negligence occurring during the extra-contractual part of the voyage. The additional liability of the common carrier for accidents does not apply.

These rules serve to protect the shipper as the weaker party. Owners, however, have sought to evade the onerous consequences of the law by inserting clauses into charter parties and bills of lading giving them the right to deviate. Thus, as a rule, the French contracts contain the clause :

Le navire est libre de faire relâches dans les ports qui se trouvent en dehors de sa route habituelle ou de son itinéraire annoncé dans n'importe quel but.⁵

In German standard contracts the clause runs :

Der Dampfer hat Freiheit, andere Häfen in beliebiger Reihenfolge anzulaufen und vom Kurs abzuweichen um Leben und Eigentum auch von Dritten zu retten.⁶

and it is very common to find in English contracts the clause :

¹ France : Le Havre, 26.3.1923, *Revue Dor.*, 2, 563. Alger, 19.3.1924, *Rev. Dor.*, 2, 411. Germany : *Reichsgericht*, 10, 32.

² Cf. France : Ripert, *Droit maritime*, 1929, II, 471 ; Germany : Schaps, *Deutsches Seerecht*, 1921, s. 536, note 2.

³ Cass. 26.4.1874, *Sirey* 74.1.481.

⁵ Rule 4.

⁴ Ripert, *ibid.* Schaps, *ibid.*

⁶ So-called "Deuta," form.

with liberty to call at any port in any order before delivering the cargo at its destination.

The laws have reacted in different ways to these efforts to evade the rules as to deviation by the insertion of special stipulations. French and German courts have accepted them without reserve.¹ In these countries the doctrine has therefore a minor importance in Maritime Law as it applies only to the irregular or petty trade which does not use the standard forms. But even in these countries the exception clauses have not found acceptance in Insurance Law. The strong position of the insurer has apparently rendered this impossible. English law, however, has not so readily yielded to the efforts made to annul the application of the doctrine. There is a strong tendency to limit the validity of the deviation clause and the courts have often granted protection against it.²

The underlying principle is that "words, however general, must be limited with respect to the subject-matter in relation to which they are used."³ This subject-matter is a safe voyage without unreasonable delay. Thus, in *Foscolo v. Stag Line*⁴ a liberty to deviate "for bunkering and other purposes" was agreed upon. The ship deviated for landing an engineer who had made a trial trip on board. This was held not to be consistent with "other purposes," for these must be analogous to bunkering and be purposes relevant to the furtherance of the joint adventure. In *Leduc v. Ward*⁵ a bill of lading acknowledged the shipment of goods for Dunkirk with liberty to call at any port in any order. The vessel, instead of making for Dunkirk, made for Glasgow and was lost there. It was held that the liberty only applied to ports substantially within the course of the voyage.

In *MacAndrew v. Adams*⁶ a cargo of fruits was shipped on condition that the fruits should be in London in a certain limited time. The shipowner made an intermediate voyage, but nevertheless arrived in London in the prescribed time. The court held that there was an unauthorized deviation because the nature of the cargo required carriage without any delay, and he might have arrived earlier. Similarly in *Glynn v. Margetson*⁷ it was held that the general words of a bill of lading which were printed and conferred liberty to deviate must be limited with reference to the specified voyage. As oranges were shipped, which being perishable required carriage without delay, an intermediate voyage was contrary to the contract.

English courts have, however, in this way not only maintained the doctrine of deviation, they have in recent years even increased its application. They have inferred, from the fact that deviation involves an un-

¹ France: Cass. 12.1.1920, Sirey 1920, 1, 339. Germany: Schaps, s. 606, note 67.

² So Bowen L.J. in *Glynn v. Margetson*, [1892] 1 Q.B. 343.

³ *Thames Marine Insurance v. Hamilton*, (1887) 12 App. C. 484.

⁴ [1931] 2 K.B. 48, affirmed [1932] A.C. 328.

⁵ (1888) 20 Q.B.D. 475.

⁶ (1834) 1 Bing N.C. 29.

⁷ [1892] 1 Q.B. 337; affirmed [1893] A.C. 351.

reasonable delay, that every delay of this kind is similar to deviation and has to be treated analogously.

In *Cunard Steamship Co. v. Buerger*¹ it has been decided that where goods are unloaded at a place other than the destination, and kept there for a considerable time, this is presumed to be a termination of the voyage which brings the rules of deviation to bear. Moreover, Atkin L.J. (as he then was), followed by Lord Phillimore, laid down the principle that every unreasonable delay in the carriage of goods by sea is equivalent to a deviation. Damages sustained by unreasonable delay must also be paid under the law of other seafaring nations. But in this case they are damages *ex contractu* based upon the implied stipulation to effect the carriage without unreasonable delay.² The contract itself with its exception clauses restricting the shipowner's liability is not affected thereby, whereas under English law the clauses are void and the liability of common carrier applies.

Thus English law with its predilection for non-contractual obligations has preserved and even developed this old doctrine common to most of the seafaring nations in the Middle Ages, whereas in other countries it has fallen more and more into oblivion.

ROBERT R. KÜHLEWEIN.

The Responsibility of Directors of Companies.—One of the characteristics of the economics of the twentieth century is the concentration of a great part of the wealth of the community in the hands of those who manage large companies of limited liability. In modern times it is becoming inevitable for the man of business who seeks to expand to ask "the public" for money; from owner or senior partner he becomes a managing or governing director; and whereas formerly "the public," as such, had no interest in the management of his business, the financial columns of the leading newspapers, filled with balance-sheets and directors' reports, are now of personal concern to an increasing proportion of the nation.

The responsibilities of directors, accordingly, are no longer the prerogative of the specialized textbook writer or the practitioner in the Chancery Division. No less do they concern the economist, the legislator and "the man on the Clapham omnibus." Moreover, since the problems of responsibility in the great industrial countries of Europe appear to be similar, they are of especial interest to the comparative lawyer who seeks first, to know the law, and then to point the path to legal progress.

Accordingly, a short, concise and readable book stating in dogmatic fashion the comparative position in Great Britain, U.S.A., Belgium and France is of practical value.³ Significantly does M. Gide (the Founder of

¹ [1925] 2 K.B. 664; affirmed [1927] A.C. 15.

² France: Lyon-Caën, *Traité de Droit Commercial*, 1931, III, 645; Ripert, II, 528. Germany: Schaps, s. 637, note 8.

³ Foreign Law Series, No. 3. *The Responsibility of the Directors of Limited Liability Companies registered in Great Britain, U.S.A., Belgium and France*. Preface by P. G. E. Gide. (Paris: Librairie du Recueil Sirey, 1933.) Pp. 187. 10s. 6d.

the Foreign Law Series) refer in his Preface with approval to the "English example" of the balance-sheet, "the compulsory deposit in the hands of an official organization of the principal documents of the company, during the whole life of the company, the strict rules applicable to the issue of the prospectus and the centralization and availability of documents at Somerset House, as institutions worthy of continental emulation.

These four studies coming from different hands constitute a practical manual. The longest study is the first—a careful and accurate piece of compression—written upon the responsibilities of officers of English companies, by J. R. Cardew Smith. Wisely, in our view, for this purpose, the author does not multiply references either to the statutory sections or to decided authorities; but it was refreshing to re-read the long quotation from that classical judgment of Lord Macnaughten in *Dovey v. Cory*,¹ perhaps the most felicitous statement of the duty of a director. "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing, that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. . . . Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them." The writer devotes his last pages to citations upon the duty of an auditor. "It is no part of an auditor's duty to give advice," said Lindley L.J. in *Re London and General Bank* (No. 2);² and Lopes L.J. in *Re Kingston Cotton Mill Co.* (No. 2)³ used the famous expression: "An auditor is not bound to be a detective. . . . He is a watchdog but not a bloodhound."

The complicated position in the United States is simply set forth by C. Laporte (of the New York Bar). Complicated it is because corporations may be formed under any of the forty-nine jurisdictions! But, in practice (the author assures us), a corporation is formed not under the Federal law but under the laws of a State. To the several States, however, certain principles are common; but from this point of view, Delaware, Maryland, New Jersey and New York are the most important States.

There is a striking similarity to English law. Directors are in a fiduciary position, and they must make no secret profit. But if, acting carefully, they make an honest mistake they are not liable for an *ultra vires* act. In the U.S. no more than in England can the standard of care and the limits of duty be defined. It is a question of fact in all the circumstances of the case. The judicial dicta to which reference is made might well apply to English conditions.⁴ A director cannot escape liability by an understanding that he is not expected to take part in supervising the affairs of the corporation. "No custom or practice can make a directorship a mere position of honor void of responsibility, or cause a name to become a substitute for care and attention. The

¹ [1901] A.C. 477, 478.

² [1895] 2 Ch. 673, 682.

³ [1896] 2 Ch. 288.

⁴ *Rankin v. Cooper*, (1907) 149 Fed. 1010, 1013 (cited at p. 89).

personnel of a directorate may give confidence and attract custom ; it must also afford protection.”¹

Passing to Belgium (by A. Leroi of the Bar of Brussels), liability is based upon Articles of the Code (enacted in 1913). A director there is in the position of a mandatory. He will be liable for breach of his mandate unless he can prove (1) that he took no personal part in the infraction ; (2) that no fault is imputable to him ; and (3) that he “denounced” the infraction after he heard of it “to the nearest General Meeting” (Art. 62). No personal obligation is incurred so long as directors act within their powers, as mandatories (Art. 61). Directors have “almost unlimited powers for engaging the Company by contracts.”² If, in fact, an *ultra vires* contract has been made, it appears doubtful under what circumstances the director will be personally liable. But it is clear that a director is liable to a third party who has subscribed for shares on the faith of an inexact balance-sheet. This liability arises under the general principle of Art. 1382, which imposes “aquilienne ou quasi-délictuelle” responsibility, *i.e.* injury resulting from fault.³

Finally, of the liability in France there is a lucid and well-documented account written by Ch. Carabiber (of the Paris Bar) which is admirably translated by Roger Sherman (of the New York Bar). The author distinguishes the *directeur* from the *director* who is both agent and trustee. The French director is liable for the acts of the manager who is incapable, insolvent or dishonest, unless the choice was based upon trustworthy information, or the directors, upon hearing of his conduct, have discharged him.⁴ Directors are liable for errors in management, however slight, particularly if their office is remunerative. For errors of management by reason of failure of supervision they are also liable. Thus, directors who gave the treasurer their complete confidence and omitted for several years to audit his accounts were collectively liable.⁵ The law also provides four distinct categories of penalties. It is a crime, for instance, to distribute a fictitious dividend, for which not only the distributing directors are liable, but all those also who, without opposition, have permitted the distribution.⁶ The difficulty, however, arises in ascertaining the truthfulness of a balance-sheet, in the absence of rules for the valuation of different kinds of assets.⁷

Judged as a manual, this book serves its purpose and the authors have done their work well. But those who make use of such a book must never forget that the law is one thing and administration of the law is another. Only by understanding the background of the social and economic life of a country and its judicial technique can one properly understand the working of its law. Such understanding must come *aliunde* : it cannot be conveyed by such a manual as this.

¹ *Kavanaugh v. Commonwealth Trust Co.*, (1918) 223 N.Y. 103, 106, 119. N.E. 237 (cited at p. 90). ² P. 115. ³ P. 118. ⁴ P. 158.

⁵ Lyons, Nov. 10, 1921. Rev. Soc. 1922, p. 213. Cited at p. 156.

⁶ Art. 44 of the law of 1867 ; cited at p. 156.

⁷ P. 166.

The *Periodical Supplement* of the Foreign Law Series, appearing every two months and published in English and French, will, to some extent, serve as companion to the series of textbooks and supply something of the requisite background of decided cases. The Number¹ under review contains seven articles in the space of forty pages. Thus, the first article discusses, with Gallic lucidity and with reference to recent decisions, whether a company, constituted according to French law, can be treated in France as a foreign company. Before the war, a company was regarded as having the nationality of the country of its registered office.² During and after the war "the criterion of the registered office was replaced by the criterion of control." "The theory of the business centre" however, has found favour in 1931, with the Court of Cassation. A company was formed in France, the directors of which were foreigners, and the capital was held by foreigners. Its object was to sell in France typewriters bought in the United States. "The country of operations"—France—was distinguished from "the real business centre"—America—and on the facts, the company was held to be a foreign company.³

G. J. W.

Law Reports of Palestine, 1920-33.⁴—There is about many of the judgments reported in this handsome volume an air of *sic volo, sic jubeo, sit pro ratione voluntas* which judges from older courts, where criticisms of the bench are readier and more vocal, will probably envy: and occasionally the curt nature of the report, no less than of the judgment, renders it difficult to discover what was really decided. Some of the cases, too, deal with points so elementary that only the recent establishment of British justice in Palestine can explain the necessity for their publication: the same is true of course of the older reports in some provinces of India. Of the cases which were briefly reported in supplements to the *Palestine Gazette* in 1926 some have been included, but there are others still of interest which have been omitted, though it is characteristic of the rapidly changing conditions of Palestine that many are already obsolete. There are also one or two cases of importance referred to in Messrs. Goadby and Doukhan's recent volume on the Land Law which do not find a place here.

But, when every possible criticism has been made, the learned Chief Justice still deserves to be congratulated on the success with which he

¹ No. 1.—1935. Editor, P. G. E. Gide, assisted by P. O. Lapie and André Strauss. English edition under the direction of E. R. Cawdron assisted by P. S. Ormond. (Paris: Recueil Sirey.) Pp. 40.

² The term "registered office" apparently translates the French *siège statutaire* or *siège social*. That to serve as a criterion for fixing "nationality" the *siège social* must be *réel* not *simulé* was, of course, admitted before the war.

³ Req. May 12, 1931. S. 32. 1. 57, cited at pp. 10-12.

⁴ Edited by Sir Michael McDonnell, Chief Justice. (London: Crown Agents for the Colonies, £1 15s. Jerusalem: Superintendent of Printing, £P.1.750.) Pp. xxx + 923.

has filled an admitted *lacuna* in the legal literature of Palestine: the difficulties of reporting, some years after the event, cases which were not properly reported at the time must have been enormous: and now that the ice has been broken and judges (and, we trust also, counsel) are faced with the possibility so disliked by Lord Eskgrove, of someone who "taks doun ma verra worrds," we may look forward to a judicial literature from Palestine of ever-increasing interest.

And what a wonderful court it is! All nations flow into it; and it may find itself from day to day adjudicating upon questions of Hungarian or Italian or Polish law, and deciding, *e.g.*, upon the nationality of a subject of the Russian Emperor who was successively naturalized in France and in the Ottoman Dominions. But, naturally, the bulk of the litigants, so far, have been of the Islamic faith: and this being so, it is perhaps curious (even when every allowance is made for the extensive jurisdiction of the Moslem religious courts) that so small a place is filled by the Sharia or its offshoot the Ottoman law. From the reported decisions of the Supreme Court of Cyprus which for over fifty years has been concerned with Ottoman law only four cases are cited in the whole volume. In *Moshe Frankenthal v. Haim Leibel* (1931, p. 639) the judgment of the Bench which was obviously in the main the work of that very learned and experienced judge Frumkin, appears to contemplate the possibility of partnership which (though not within the ambit of the Partnership Ordinance) was nevertheless not governed by the provisions of the Ottoman Civil Code but by Rabbinical law—though it is a little difficult to see what force could be attributed to Rabbinical law in such a matter save as a means of interpretation. In *Municipality of Haifa v. Khoury* he held that the civil courts could not recognize the Sharia unless applied by express legislation, a *dictum* which (although the same result might have been reached in another way) is in apparent conflict with several Cyprus decisions. In *Abdullah Chedid v. Tenenbaum* (1933, p. 831 at 844), the Privy Council, "in the absence of any provision" of the Ottoman law, applied the English law of concurrent obligations, though in fact an express provision leading to the same result might have been found in the *Mejelle*.¹ But perhaps it is still more noteworthy (the Ottoman law being in any case incomplete and archaic) that more liberal use is not made of the concluding part of the Palestine Order in Council 1922, Art. 46. *Chedid v. Tenenbaum* appears to be the only case in the volume in which it was invoked. We have recently heard a member of the highest tribunal describe it in words reminiscent of India as "the justice, equity and good conscience clause": and surely it might have been applied, *e.g.*, in *Municipality of Haifa v. Khoury* to remedy a defect of the Ottoman law. In *Raym v. Hadar Hacarmel* (p. 802 at 804) the court propounded but did not find it necessary to answer the question whether Art. 46 enables the courts to grant a remedy that was not available under Ottoman Law.

¹ Art. 262: see *eodem sensu* Baillie's *Moohummudan Law of Sale*, Ch. iv, s. 2, *ad init.*, p. 29.

One minor criticism of detail. To give the names of plaintiff and defendant in full is (as all readers of Indian law reports are only too painfully aware) merely to introduce an unnecessary element of difficulty into the work of consulting the Index. Why should *Nicola Elias Nasr* (p. 371) be indexed as *Nasr* and *Ibrahim Elias Nasr* (p. 648) be indexed under *Ibrahim*? A rigid rule in these matters cutting down the title of each case to the minimum necessary for identification would be a great convenience.

S. V. FG.

The Constitution of Early Trading Companies.—Although a good deal of material and research has been published about the Companies which laid the foundations of Great Britain's trade overseas, an addition is always welcome. Dr. Alfred Wood, in a concise and readable *History of the Levant Company*¹ has skilfully held the balance between the interests of the economic and diplomatic historians. In doing so he has devoted a chapter to the organization of the Company which is of particular interest to the student of the legal foundations of commercial corporations. It presents the governor, deputy governor, the treasurer, husband, secretary and eighteen assistants with a clear survey of their respective duties. The position of governor developed into one analogous to that of the Chancellor of a University at the present day. As the governor withdrew from active control the deputy governor replaced him as chief executive officer. The husband kept the papers, bonds and seals of the Company, passed bills of entry for goods laded on ships, and in general presided over the routine administration of the trade. The relationship of the Company with the Ambassadors, who, while representatives of their country, were also closely concerned with the interests of the Company, is one which receives Dr. Wood's special attention. The consuls likewise made a considerable contribution to the conduct of the Company's affairs. In the main business of the factories the consuls were the representatives of the Company's authority, as well as judges, protectors and guides, exercising control over all their affairs. "From an external point of view," Dr. Wood adds, "their functions were still more important, for they were responsible for the maintenance of all the privileges granted by the grand seigneur in the capitulations and for the protection of the factors against the insolence and oppression of the Turks." The position of the subordinate officials is described with equal clarity and discernment, so that the volume provides a reliable contribution to the history of trading corporations as well as of the trading enterprise of Great Britain in the Levant.

C. E. A. B.

The Survey of English Law.—The editorial introduction to the annual volume surveying English law, issued from the London School of Economics (London: Sweet & Maxwell, 10s. 6d.), sums up the year 1934 as being a "quiet year." Whatever may be the contents of any par-

¹ London: Humphrey Milford. Pp. xviii + 263. 12s. 6d.

ticular volume, the value of a publication of this kind arises largely from its continuance in a series. Dates often present a difficulty to the memory, so that reference is greatly facilitated by being able to refer to annual volumes which provide ready access to statutes, case law, and current literature. The last section is particularly useful, as it places at disposal a wide range of references, including periodicals as well as books. This is the kind of work which should be especially welcome to the public librarian, either at home or overseas, who wants a convenient volume to assist the reader anxious to study some subject of law. The increasing extent to which the public libraries in this country are being used by the serious student should provide additional sales for this volume, especially as the Central Library for Students enables any volume mentioned in it to be available in the local library. A work maintained at this high standard by eminent authorities in their respective subjects claims consideration before many others on account of its reliability and authority. Frequent use for general reference rather than for points of law has proved its value time after time so that it has now become a favourite collaborator never failing to render the desired assistance.

C. E. A. B.

Canadian Bar Association. Report of 19th Annual Meeting of 1934.—

The annual report contains as usual much that is valuable. We may notice particularly the address by the late Lord Tomlin on the Year Books, and the Report of the Commission on Uniformity of Legislation. This commission, it is clear, has done and is doing excellent work. It prepares model laws for adoption by the provincial legislatures, and in this way has succeeded in smoothing away many differences which have crept in between the laws of different provinces.

F. P. W.

Columbia Law Review.¹—The Editorial Board changes at the end of each Academic year, the new Board taking charge in June. It is consequently convenient to group the numbers of the *Review* on this basis.

The industry exhibited by the mass of case references in the footnotes to the Notes of Decisions and Legislation, as also to many of the articles, is a testimony to the dominance of precedent in the American legal world. "During the period of a century and a half . . . more than 16,000 volumes of American Law Reports have been inflicted upon the profession"² as against which our contribution of 4,000 volumes in three and a half centuries is comparatively modest. Yet, as in his graphic American manner is pointed out by the same writer, this only represents on the average one reported case per annum for each of the thirty thousand members of the American Bar Association out of a total of fifteen millions of recorded cases.

¹ Vols. xxxiv (June–December), xxxv (January–May).

² "Prologue to Nomostatistics," by Geo. H. Jaffin. *Col. L. R.* xxxv at p. 6.

The learning and thought which distinguish most of the contributions are in the case of a few accompanied by an astonishing naïvety of humour and exuberance of phraseology. Happily no others attain the extreme of sentiment which mars the eulogy pronounced by Professor Llewellyn over the late Justice Holmes,¹ or indulge in the energy of invective directed by him against the law schools of Columbia, Harvard and Yale. These he describes as "shabby and silly" with a further implication that all other American law schools are even more shabby and more silly.²

Such remarks as these are neither witty nor true, and the article in which they occur only darkens counsel. Fortunately it is exceptional; other contributions are often illuminating and always informing. Mr. Pickett writes in an interesting manner on Nicknames and Unfair Competition,³ with special reference to the case of *Bayuk Cigars Inc. v. Schwarz* (the Bayuk Phillies Case). The authorities cited are mainly American, but some English cases have also been studied. The author's general conclusion is that, notwithstanding the Bayuk case, "no use of a nickname is necessary in order to prevent its appropriation by a competitor."

Mr. Wheeler Cook contributes a long discussion of the difficult problem which arises when the facts making up a tort occur partly in one and partly in another jurisdiction.⁴ The range and frequency of such long-distance torts have undoubtedly increased and are likely to continue to increase. It is possible now for a broadcaster to commit if he please a tort of an all but universal character. In all these cases Mr. Cook finds the usual "foreign right" theory inapplicable, or at least inadequate for their solution. He examines critically the provisions of the "Restatement" which touch upon the problem, finds them defective and suggests a revised phraseology.

Mr. Gellhorn of Columbia on "Contracts and Public Policy"⁵ is more informative than conclusive. American courts do not appear to be inspired by English cases in this connexion, and it seems odd to find contracts made by prostitutes considered without a citation of *Pearce v. Brooks*.⁶ Some of the American cases quoted are surprising and suggest that the courts of some jurisdictions do not, as Mr. Gellhorn advises, "balance competing public policies" but rather annul a contract if an ingenious objection on the ground of public policy can be raised against it. In these degenerate days the classical remarks of Sir G. Jessel in *Printing and Numerical Reg. Co. v. Sampson*⁷ presumably no longer stir the legal heart.

The Restatement is quoted by Mr. Gellhorn⁸ as laying down that "a bargain, except mutual promises to marry, that is not one of necessity or

¹ "Holmes," *Col. L. R.* xxxv, pp. 485 ff.

² "On What is Wrong with So-called Legal Education," *Col. L. R.* xxxv, at p. 652.

³ *Col. L. R.* xxxv, pp. 33 ff.

⁴ "Tort Liability and the Conflict of Laws," *Col. L. R.* xxxv, pp. 202 ff.

⁵ *Col. L. R.* xxxv, pp. 679 ff.

⁶ (1866) *L. R. Ex.* 213.

⁷ (1875) *L. R.* 19 *Eq.* 462.

⁸ At p. 689.

charity, is illegal if made or . . . to be performed on Sunday." The exception in favour of marriage is indeed happy and in addition it is to be hoped that preaching engagements may be deemed works of charity. But even with such reservations the range of illegality is alarmingly wide, unless the word "bargain" has some hidden meaning. In New York, however, the courts, we are told, "do not regard a contract as illegal because it was made on a Sunday though they do condemn bargains which call for performance on that day."¹

In the field of pure Jurisprudence the Hohfeldian concepts are expounded by Professor Goble of Illinois.² The interpretation of statutes in the light of their policy by the English courts is the subject of a valuable study from this side of the Atlantic from the pen of Professor Llewellyn Davies.³ In a lengthy article on Force and the State,⁴ Professor Hale considers the methods of direct and indirect duress employed or countenanced by the State. This is a matter of present interest in its relation to Sanctions in international relations. Professor Hale discusses it mainly in connexion with the thirteenth and fourteenth Amendments of the Constitution and the decisions of the Federal Court thereon. A further and supplemental article by the same author on "Conditions and Constitutional Rights" will be found in pp. 321 ff. of the same volume.

Many of the Reviews of books are attractive by their vigour and freshness.

F. M. G.

Tulane Law Review.⁵—In No. 1 (December 1934), Professor Ernst Freund discusses the Responsibility of the U.S. Government in Internal Law.⁶ Tort liability, following the Common Law, is in general excluded, but divergence of opinion exists as to cases in which action on implied contract is possible, the tort being waived. In the separate States law and practice abundantly varies; attention is specially drawn to the recent provision (1929) in New York whereby "the State waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the Supreme Court against an individual or a corporation." In No. 2 (February 1935), Dr. Balogh criticizes the Uniform Law of Bills of Exchange; contrasting in particular the provision of Art. 1 (6), requiring insertion of the name of the person to whom or to whose order payment is to be made with the facility with which Art. 14 makes it possible "to transfer the bill as an instrument

¹ *Ibid.*, at p. 689, footnote 42.

² "A Redefinition of Basic Legal Terms," *Col. L. R.* xxxv, pp. 535 ff.

³ *Col. L. R.* xxxv, pp. 519 ff.

⁴ *Col. L. R.* xxxv, pp. 149 ff.

⁵ Vol. ix (December 1934–June 1935).

⁶ Reproducing Report prepared for the International Congress of Comp. Law 1932. See also the learned author's General Report in *Acta. Acad. Jurispr. Comp* II, pt. iii, pp. 9 ff., and the article by Dr. Borchard in *Journ. Comp. Leg.*, 3rd Series, vol. xii, pt. i, pp. 1 ff.

payable to bearer and to treat it in every respect as an instrument payable to bearer." The same number contains a brief contribution from Professor J. B. Thayer attacking the "traditional Anglo-American disregard of penal stipulations."

In an article on Modern Legal Education and the Local Law School in No. 4 (June 1935), Professor Brosman tells us that fourteen institutions only out of the seventy odd members of the Association of American Law Schools offer courses in Comparative Law. He adds that "the same unfortunate condition exists as well in the field of comparative legal research, for, apart from the efforts of the Tulane Law Review and the Section of International and Comparative Law of the American Bar Association, but slight improvement is apparent." The inclusion of Comparative Law within the curriculum of the university law school is urged "if its graduates are to function efficiently as members of a learned profession under present and future social conditions."

Probably to many the contribution which may prove of greatest interest is that by Professor Franklin in the same number entitled "Equity in Louisiana." That State is universally quoted as furnishing an exception to the Common Law predominance in the States. But Professor Franklin tells us that during the last half-century at least the Civil Code has been giving way "before an infiltration of British law," and that "a veritable steady upheaval" has been taking place in the Court Room. One instrument for effecting this has been found in the interpretation of Art. 21 of the Louisiana Code which provides that "in all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." The process is related by the author to natural conditions in accordance with his materialistic conception of history, Marx and Engels being much quoted as of unquestioned authority. But this aspect of the contribution is less attractive.

F. M. G.

L'Egypte Contemporaine.¹—"The recent case of *Agency Co. v. Short*,"² wrote the late Mr. Challis in 1889, "is of a sort to afford sincere pleasure to every rightly constituted mind."³ Part of Mr. Challis' pleasure may have been due to the opportunity afforded for the use of his somewhat recondite learning, but this was coupled with a "pious satisfaction at the disappointment of an interloping rogue." The present writer has recently ventured the opinion that in Muslim law also recovery of land by the "true owner" would not be barred in a case in which independent squatters had successively possessed the land for periods amounting in all to the period required for limitation of action.⁴ In an article by M. Cadéménos in a recent issue of *L'Egypte Contemporaine*⁵ dealing at

¹ *Revue de la Société Royale*, Nos. 151-6 (1934-5).

² (1888) 13 A.C. 793.

³ L.Q.R., V at p. 185.

⁴ *Land Law of Palestine*, by Goadby and Doukhan, at p. 256.

⁵ No. 151 (November 1934), pp. 543 ff.

some length with prescription against Wakf ownership this problem is also posed and appears to be resolved in the same sense. The subject is of too technical a character for discussion in these pages. M. Cadéménos is primarily concerned to oppose in the first place the notion that acquisitive prescription exists in Muslim law and in the second place to contest the view that the *fin de non recevoir* which takes its place rests, at least in the case of Wakf, upon anything in the nature of usurpation for the prescribed period of thirty-three years. It is only necessary, he asserts, that the *usurpateur* has not recognized the rights of the Wakf during that period. The ferocity with which he attacks the well-known compilation of Kadri Pasha is a feature of the essay; "*voulant traduire le Droit Mussulman en dogmes modernes*," he says, "*il l'a méconnu et faussé; c'est le cas ou jamais de dire 'Traduttore, Traditore.'*"¹

The numbers of this Journal contain numerous articles of value dealing with things Egyptian, legal and economic. In particular the special number celebrating the Silver Jubilee of the Society is rich in matter, and it is pleasant to refer to two contributions by Egyptian scholars. Abdul Hamed Pasha Badawi writes on "*Les Problèmes juridiques de l'Egypte contemporaine*,"² and Mohammed Kamel Moursy on "*Evolution historique du droit de propriété foncière en Egypte*."³

In the *Chronique Législative*, 1933-4,⁴ by M. Yallouz may be noted mention of Law No. 45 of 1934 conferring judicial character upon the judgments given by Egyptian Consuls in Abyssinia. Objection was, indeed, taken by one member of the Legislative Assembly to this assertion of capitulatory privileges on the part of a country which demands (and not unreasonably, it may be added) freedom from the capitulatory rights of others. But the bill was passed against the minority of one.

F. M. G.

¹ No. 151 (November 1934), p. 552.

³ *Ibid.*, pp. 287 ff.

² No. 153-4, pp. 367 ff.

⁴ No. 152, pp. 761 ff.

NOTICES OF BOOKS.

INTERNATIONAL LAW.

THE somewhat rapid succession of new editions through which this standard treatise¹ on international law has passed since its original publication—this is the fourth since the World War—is evidence enough of the wide public demand for it. It is evidence also of the enterprise of the publishers in keeping it up to date in order that it may serve in the highest degree the needs of the large number of persons who have occasion to use it. Nine years have elapsed since the last edition appeared in 1926, and during that period some important developments have taken place and many new additions have been made to the literature, both of which receive their due attention in the present edition. All who are familiar with Dr. Lauterpacht's brilliancy as a scholar, and his carefulness as a writer, will agree that the publishers have been most fortunate to secure his services as the editor of the present revision. The task of revising a work such as this is a tedious and difficult one, and requires patience, carefulness and the faculty of concise statement. In the opinion of the reviewer, Dr. Lauterpacht has displayed in high degree all these qualities in the execution of his present task.

He tells us that he had no choice but to adopt the procedure of the preceding editor, Professor McNair, and to renounce all thought of attempting to distinguish between the text of the original edition and the changes made by the editor. In fact, he became convinced early in the beginning of his task that the separation was not practicable. The result is, if it is important to the reader that he should know what Oppenheim's exact text was, he will have to turn back to the author's second edition. This necessity is, of course, regrettable, but it seems unavoidable, and will have to be accepted as the lesser of two evils.

In undertaking the task of revising a treatise devoted in the main to the laws of war, Dr. Lauterpacht very appropriately, in the opinion of the reviewer, has deemed it necessary to indicate why he considers a study and exposition of the laws of war to be still "a legitimate object of the science of international law," because there has been a widespread disposition since the last great war to belittle this part of international law as being of

¹ *International Law. A Treatise.* By L. Oppenheim, M.A., LL.D. Vol. II, *Disputes, War and Neutrality.* Fifth edition, edited by H. Lauterpacht, LL.D., Dr. Jur., Dr. S. C. Pol. (London: Longmans, Green & Co., 1935.) Pp. lii + 782. 45s.

no real utility and to allow it to rest among the discredited unrealities which were all but destroyed by the World War. Other critics tell us that war is an outlawed institution and that the efforts of the world can be better directed towards making the outlawry effective than in wasting its time and effort in the endeavour to regulate its conduct by means of rules which are dignified by the name of "laws." The editor's answer is that war has not been outlawed, however much we may wish it were. On the contrary, most nations are to-day proceeding on the assumption that another great war is at least a possibility; all of them are strengthening their military, naval and air armaments; most of them are endeavouring to devise measures for the protection of their cities and populations against the effect of air attacks; while some of them, like the United States, which flatter themselves that they can remain aloof when the war comes, are enacting legislation for the preservation and maintenance of their neutrality. He points out that if the ideal cannot be achieved, namely, the abolition of war, there is no reason why an effort should not be made to humanize it as far as possible by regulating its conduct by means of rules which have the force of law and which therefore create a legal responsibility for the belligerent or neutral who violates them. The reviewer shares fully the opinion of the distinguished editor on these points. In short, he believes that the laws of war, in spite of their occasional or even frequent violation, do have a utility worth preserving, and so long as there is even a possibility of war in the future they should not be discarded and thrown overboard.

The additions to and the modifications of the laws of war during the period covered by the present revision have not been numerous, because, as already suggested, there has been a disposition to leave the matter alone. There was the so-called gas protocol of 1925; two elaborate and excellent conventions concluded in 1929, one relative to the treatment of prisoners of war, the other concerning the sick and wounded; Part V of the London Naval Treaty of 1930, relating to the use of submarines against merchant vessels, and the convention on maritime neutrality adopted in 1928 by the Sixth International Conference of American States at Habana. The provisions of these conventions are concisely explained by the editor. An admirable code of rules relative to the conduct of air warfare was drafted by an international commission of jurists at The Hague in 1922, but so little interest has been shown in the matter that not a single government has ever taken steps to bring it into force. In 1928 Senator Borah proposed the calling of an international Conference to revise and restate the law of maritime warfare, but his proposal found few supporters.

The result of the general lack of interest in the whole matter is that the law, especially of maritime warfare, is in a more or less chaotic state, while as to air warfare there are no conventional rules in force aside from the provisions of the gas protocol of 1925, and there are some important States, such as the United States, which have not ratified it. The next great war, if unhappily there should be another one, will therefore have

to be fought in considerable part without rules or subject to rules as to the meaning of which there are wide differences of opinion. Many of the old controversies—for example, those between belligerents and neutrals relative to their respective rights on the sea—will be revived, possibly in more irritating and dangerous form.

There have been some other events or developments during the past nine years that receive their proper treatment in the new edition of Oppenheim. Among them may be mentioned the multiplication of treaties of conciliation and arbitration and the conclusion of the Pact of Paris. New sections are added in explanation of each of these, and other matters and here and there new footnotes are inserted. His analysis and evaluation of the Pact of Paris, although concise, is excellent. There is also some new matter on the subject of sanctions, the Permanent Court of International Justice, neutrality and various other subjects. No important developments since the last revision have failed to receive the editor's attention. Yet by means of conciseness of expression and judicious suppression of unimportant and obsolete matter he has succeeded in keeping down the size of the new volume within reasonable limits. In fact it contains only about thirty pages more than the last edition. Altogether he has done a difficult task in admirable fashion and the value of this much-used treatise has been greatly increased.

JAMES WILFORD GARNER.

GREAT BRITAIN AND THE LAW OF NATIONS.

IN 1932 Professor Smith published the first volume of a large study on which he has embarked, dealing with Great Britain and the Law of Nations. The aim is to present a documented exposition of the principles governing the diplomatic action of Great Britain in matters which fall within the field of international law. The first volume dealt with states; this second volume with territory.¹

In the preface to the first volume the editor stated that it could only be offered as an experiment. He now says that, although the benignity of learned reviewers in several countries has encouraged him to proceed with the publication of this second volume, he cannot feel that the experimental stage has yet been passed. It is to be hoped that the reception of the volume will dispel his doubts, for of the value of the series for all concerned in international law there can hardly be two opinions. It is surely time that we had in England a series corresponding with Moore's *Digest of International Law as applied in the United States*.

Professor Smith has chosen the method of selecting documents which illustrate the views of the British Government on the topics; but there is no attempt to be exhaustive. The subjects that come within the second volume are "Title to Territory" including "Discovery," illustrated e.g. by the Alaska dispute; "Abandonment" and "Reoccupation,"

¹ *Great Britain and the Law of Nations*. Vol. II. Territory (Part I). Edited by Herbert Arthur Smith, D.C.L. (London: P. S. King & Sons, 1935.) Pp. 422. 16s.

illustrated by the Falkland Islands and the Bahrein Islands dispute—a very modern example; and the acquisition of territory by British subjects, illustrated by Chartered Companies and Rajah Brooke's history in Sarawak. Then come the "High Seas," "Territorial Waters," which includes an analysis of the attempt at codification made by the League of Nations conference, and the questions of straits, bays, hot pursuit and jurisdiction in ports, and, lastly, international rivers. There is an appendix of the British case in the Behring Sea arbitration.

In making his selection the primary rule has been to choose documents which illustrate questions of legal principle. Generally, he has preferred the lesser-known controversies to the better-known. One change in method has been made since the first volume was issued—the government documents have been printed more fully, and the comments have been correspondingly cut down.

Professor Smith notes the growing difficulties of obtaining grants in aid of research during this period of economic depression. The gradual economic recovery should make possible at least the "restoration of cuts" for scientific research; and we hope that the editor will be encouraged and assisted to bring out a third and a fourth volume with short delay.

NORMAN BENTWICH.

THE SOVIET UNION AND INTERNATIONAL LAW.¹

Now and again we receive timely reminders that, both in the field of law and in wider fields, a tremendous volume of human experience and scholarship is being created in Soviet Russia, to which (largely owing to difficulties of translation and perhaps a little to the unconscious semi-boycott of the U.S.S.R. in intellectual matters) insufficient attention is paid even by serious students.

Mr. Taracouzio's book is such a reminder; for he has collated and prepared in readable form a great volume of material, little less indeed than a complete historical presentation of public international law as applied by the Soviet, with its novel outlook on the State in itself and in its interrelation with other States.

His book is thoroughly and carefully written, with a high measure of balance and impartiality. He does not confine himself to describing public international law in the narrow sense, but gives a full account of the municipal law in all those departments where it comes into contact with foreign states; and moreover he prepares the mind of the reader who knows little of Russia by giving him a pretty clear picture of the philosophy and ideology underlying the attitude of the Soviet State to problems of international law. So well, indeed, is the book written in this respect that its study can be recommended to English lawyers as a good method of giving themselves at one and the same time a lesson in Soviet constitutional law and a clear glimpse of Bolshevik philosophy.

¹ *The Soviet Union and International Law.* By T. A. Taracouzio. (London: Macmillan.) Pp. xvi + 530. 3rs. 6d.

He naturally devotes a good deal of attention to the conflicts that constantly arise in the period of transition between pure communist doctrine and practical everyday advantage ; in many such conflicts, the Soviet naturally pursues the practical advantage, but Mr. Taracouzio very fairly recognizes that loyalty to Marxist doctrine in not a few instances has led U.S.S.R. to sacrifice substantial material interests. It is a misfortune that the book was written before the Soviet Union joined the League of Nations, for Mr. Taracouzio's comments on this striking apparent departure from communist theory would be worth reading.

There are one or two curious errors : at pp. 34, 35, the writer uses language which almost makes it appear that he regards the voluntary restriction of sovereignty involved in federation as inconsistent with the previous existence of unrestricted sovereignty ; and at p. 134 he gives the impression that the jury system exists in Russia ; but these are small and accidental defects in a book which on the whole deserves nothing but praise. It gives a perhaps unexpected vision of the completeness and maturity of Soviet jurisprudence in the realms both of public international law and of constitutional law, whilst indicating at the same time the existence of plenty of problems for Russian and foreign students to work out in the future.

D. N. PRITT.

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

THIS little book ¹ contains four lectures delivered by Professor Hudson at an American School of Law this year, and deals with the developments during the last fifty years in the provisions for the pacific settlement of international disputes. It examines in particular the manner in which Art. 2 of the Pact of Paris may be implemented. The subjects of the four lectures are, respectively, (1) The Law of Pacific Settlement prior to 1914 ; (2) Pacific Settlement through the League of Nations ; (3) Pacific Settlement through the Permanent Court of International Justice ; and (4) Treaties of Pacific Settlement since 1920. A useful series of appendices contains, in addition to the Hague Convention of 1907, the Covenant of the League, the Statute of the Permanent Court and the Pact of Paris—which are readily available to students—four American Conventions dealing with the Prevention of Conflicts, Arbitration and Conciliation which are not equally available.

Professor Hudson writes with knowledge, with authority and with wit. He examines with a clear mind and criticizes frankly the action of his own country about international arbitration and conciliation. If only all American publicists would think as frankly, there would be more thorough co-operation between the United States and Europe. He points out the backwardness of the American Treaties for the pacific settlement of disputes as compared with those made by the Scandinavian countries. And

¹ *By Pacific Means*. By Manley O. Hudson. (New Haven : Yale University Press, 1935.) \$2.50. Pp. 200.

his final judgment is that the Americans have been content to continue "to ride in a wheelbarrow which a procession of high-powered automobiles has left far in the rear." Americans, he remarks shrewdly, have no monopoly of self-emulation. "It is an attitude into which national pride slips very easily. Yet it might serve a useful purpose if each people would occasionally take stock of its own position and brace itself to face the facts as they are." It is another shrewd epigram that disillusionment is the usual price of failure to anticipate failure. These few citations are enough to show the ripe wisdom contained in this little book, which should be read by all who wish to understand the remarkable development that has been achieved in the machinery for the settlement of international disputes by pacific means. What is lacking in the international world to-day is the will to use the instrument.

N. BENTWICH.

THE CAUSES OF WAR AND THE CONDITIONS OF PEACE.¹

THIS book is one of the publications of the Graduate Institute of International Studies at Geneva, and contains a short course of lectures which were delivered there in 1934 by the Professor of International Law of the University of Chicago. The author explains at once that the lectures were not in any sense a treatise on the causes of war and the conditions of peace, but rather an outline for such a treatise. They are based on studies which were initiated some years ago by the Social Science Research Committee at the University of Chicago upon the causes of war. The subject is treated in five main heads: a general survey of the problem; fluctuations of war and peace; armaments and the balance of power; law and organization; and war and public opinion. The first part of the study is a baffling enterprise. Professor Wright says truly that little that happens in the world does not have a bearing on the development of the problem. Developments in the fields of religion and philosophy, technology and science, population and social institutions, are no less important than those in the field of national and international politics. And it cannot be said that the study foreshadows any solution. The author does not try to reach any definite conclusions. He introduces, indeed, into the question certain American measurement technique, measuring the frequency and duration of wars. But he agrees that, while the increasing regularity of the fluctuations *appears* to make the prediction of the time of general wars more practicable, this appearance is probably illusory. He quotes again studies which indicate that men who fought frequently in childhood are more favourable to war than those who did not; that persons are more favourable to war between the ages of thirty-five and forty-four than at other ages, etc. But all these researches, ingenious as they are, do not help to a solution of the greatest menace of our civilization. The book, however, if not suggestive of a solution, has many stimulating ideas.

N. B.

¹ By Quincey Wright. (London: Longmans, Green & Co., 1935.) Pp. 150. 5s.

TREASURE FROM THE WEST.

"For thirty years," we are told, "Orrin Kip McMurray has been a living part of the school of Jurisprudence of the University of California as a teacher and, in addition, since 1923 as the school's beloved Dean."

This volume¹ is a tribute of some twenty-four essays, rich and diverse in their nature, offered to the Dean by colleagues and pupils in both hemispheres.

Although the general flavour of the collection is appropriately jurisprudential, the book contains something for every man, whether his interests lie in public law, private law or general jurisprudence.

1. *Public Law*.—Some of the essays which may be grouped under the heading of public law make particularly topical reading. It is difficult not to sympathize with Mr. Douglas B. Maggs in his spirited defence of the National Recovery Legislation (pp. 399-437), and with Mr. Karl N. Llewellyn (pp. 277-322) in his declaration of faith that, "whatever the [U.S. Supreme] Court has *said*, it has repeatedly made concessions to Governmental practice and Governmental need." These two essays were written and published before the Supreme Court had pronounced its decision paralysing N.R.A. It is possible that Professor Llewellyn will now feel impelled to make an even more impassioned plea for "an intelligent reconstruction" of constitutional law and theory, bearing in mind "Gény's obvious sanity" (p. 286). Recent events too make Mr. Manley O. Hudson's article on "International Engagements in the Permanent Court" (pp. 187-220) particularly interesting. Those who recall the keen discussion on the Interpretation of Statutes raised by Professor Eastwood at the 1935 meeting of the Society of Public Teachers of Law will be particularly impressed by Mr. Hudson's authoritative account of the method of interpretation adopted by the Hague Court, and its use of "*travaux préparatoires*" (pp. 203-6). Whether or not all English constitutional lawyers will agree with Mr. Hudson when he says (p. 190) that "a State cannot rely on its own constitution or legislation as an excuse for non-performance of its obligations" is open to some doubt. And there may still be some who, with Dicey (*Law of the Constitution*, eighth edition), will doubt whether Professor Edwin D. Dickinson's suggestion that international law is part of Anglo-American law, and that a nation may not ratify an illegal arrest or seizure, is consistent with their notions of English Parliamentary sovereignty (Jurisdiction after Violation of International Law, pp. 117-34). But the reviewer at any rate cannot help feeling that these distinguished international lawyers are "on the side of the angels."

Mr. Dudley O. McGovney will no doubt have rendered a signal service by drawing attention to the amazing tangle of laws governing the citizenship and nationality of persons resident in U.S.A. possessions; and his

¹ *Legal Essays*: in tribute to Orrin Kip McMurray. (University of California Press and Cambridge University Press, 1935.) Pp. x + 694. £1 10s. net.

article, "Our Non-Citizen Nationals, Who Are They?" (pp. 323-74), together with Judge Henry's "Story of the Criminal Jury" (pp. 135-64), are sure to be of great interest to "Comparative Lawyers." Judge Henry's accounts of the jury system in France since the law of 1932, and of the honorific nature of jury service in Italy, are particularly noteworthy.

We observe that Judge Henry is in favour of the recognition of decisions given by the majority vote of a jury: the system of a majority verdict in a collegium of three judges is already common and, as Captain Hubert D. Hoover points out in his account of "Army Courts Martial" (pp. 165-86), courts martial, which are analogous to a jury in some respects, adopt the system of majority verdicts in respect of certain crimes (p. 175). In the remaining essay on criminal law, "The Criminal Act," pp. 469-86, Mr. Justin Miller draws attention to the theories of "remoteness" peculiar to criminal law.

2. *Private Law*.—In spite of the sophistication one associates with the native moving-picture industry, it seems clear that Californian lawyers are much concerned with elemental things like trees, water-courses and mines. Mr. Sayre MacNeil is at once entertaining and instructive when he explains "The Growing Lawlessness of Trees" (pp. 375-98). Although tree-law goes back to the Laws of Manu, it is of vital importance to-day in the United States. The need for extensive afforestation in the U.S.A. as a means of preserving the great agricultural plains from the ravages of dust storms caused by the indiscriminate slaughter of trees has recently been urged by more than one authority. The need for tree-law is universal; alike in the Twelve Tables and in the customs of the most recently discovered tribe of New Guinea we find strict regulations concerning the growing of trees. *Giles v. Walker*, which has even been applied to the "loftier prickly pears" in New South Wales, is an example of "lawlessness" of growing things which may be corrected to some extent by the orders made under modern English Acts of Parliament dealing with agriculture.

Every student of Roman law will remember something of the importance attached to the rights of riparian owners by the Romans, who were much concerned with the problems created by their turbulent and extremely changeable streams. In his article on "The California Law of Riparian Rights" (pp. 1-38), Mr. Joseph W. Bingham is careful to point out that geographical and economic conditions have had a considerable hand in moulding precedents of the river law which is so highly developed in California. The comparison between English and American law in matters of prescriptive riparian rights, discussed at p. 15, is an interesting example of parallel but different legal development.

Mr. William E. Colby has also something to say about water rights in his article, "The Freedom of the Miner and Water Law" (pp. 67-84); the scope of his learning in comparative mining law, upon which he establishes the main thesis, "that the doctrine of prior appropriation of

water has been almost universally in force in the important mining regions of the world . . ." is really astonishing.

Nor is Equity forgotten. Mr. George P. Costigan, Junr. (pp. 85-116), examines "Those Protective Trusts which are miscalled 'Spendthrift Trusts,'" and makes an impressive defence of them against such formidable attackers as the late J. Chipman Gray. Mr. Costigan adds his voice to those who have noted how Equity, though anxious to guard against the economic evils such as those said to be created by "perpetuities," has, in this country and in America, so often failed to notice greater economic evils in the shape of abuses of the company law. Mr. Costigan raises some interesting points in connexion with s. 33 of the Trustee Act, 1925 in note 45, pp. 114, 115, but we may content ourselves with the remark that the Californian and New York notion that a protective trust may only be permitted for a limited amount of income, appears to be foreign to English ideas, although no doubt if such a rule had existed here some scandalous cases might have been avoided. English equity cases are considered in Mr. William E. Masterton's essay on "Specific Performance of Contracts to deliver Specific and Ascertained Goods under the English Sale of Goods Act and the American Sales Act" (pp. 439-68), and the recent cases of *Re Wait*,¹ *Behnke v. Bede Shipping Co.*,² and the earlier but equally interesting case of *James Jones v. Earl of Tankerville*,³ are discussed from a comparative standpoint. The author approves a recent opinion of Lord Hanworth to the effect that s. 52 of the Sale of Goods Act applies, whether or not the property in specific and ascertained goods in respect of which specific performance is claimed has passed to a purchaser.

"Some recent Subrogation Problems" is the title of the contribution of Mr. Stephen I. Langmaid, who brings a fresh point of view to English readers, and observes that marshalling is "a prominent aspect of subrogation."

Roman law is represented by an account of "The Business Relations of Patrons and Freedmen in Classical Roman Law," by Mr. A. Arthur Schiller, who explains the various ways in which Romans avoided the effects of popular prejudice against trade.

French private law is represented by an essay of M. Henri Capitant, who needs no introduction to English readers. "*La propriété Commerciale*" (pp. 51-65) is a typically clear Gallic account of a statute of 1926 designed to protect small shopkeepers from their landlords. M. Capitant appears to be no lover of this innovation, and he meets economic argument in support of it with counter-argument drawn from the same science. Whether or not we agree with M. Capitant's view of the policy behind such a statute, we can all agree with his protest against hasty and badly drafted interference with existing law, and we cannot but admire the admirable way in which he unfolds to us the history of the legislation in point. In connexion with note 2 on p. 62, dealing with

¹ [1927] 1 Ch. 606.

² [1927] 1 K.B. 649.

³ [1909] 2 Ch. 440.

réciprocité législative, we may observe that the English Landlord and Tenant Act of 1927 does provide for the renewal of a lease in certain circumstances where compensation for goodwill is insufficient. It would seem that "*indemnité de plus-value*" corresponds very nearly to our term "compensation for goodwill."

The law of evidence finds a place in the article of Mr. Edmund M. Morgan (pp. 487-512), "Instructing the Jury upon Presumptions and Burden of Proof"; it is to be hoped that this instructive article will not, as the author suggests, "pass unnoticed except by the few."

Last, but by no means least, there is an article by the ever-young Dean Wigmore. This deals, in an entirely new and original manner, with the intimate relationships existing between contract, deceit and estoppel, which, says the Dean, "are three species of the same genus . . . the general function of that genus is to define the conditions upon which one person's assertion of facts made to another person will charge the former legally" (p. 642).

The theory is worked out in table form with a mathematical accuracy that delights analytical jurists like the Dean's colleague, Professor Kocourek, although it may make some of our heads swim.

3. *Jurisprudence*.—"When legal transactions are entered into in reliance upon judicial decisions which are afterwards overruled, has there been a change of law or did the parties to the transactions act under a mistake of law?" This is one of the problems discussed by Dean Pound in his essay, "More about the Nature of Law" (pp. 513-35). It is hardly necessary to point out the importance of this problem to-day in the U.S.A. The doctrine of *res judicata* will no doubt settle some of the difficulties arising from the new-found unconstitutionality of N.R.A., but it will not determine the theoretical problem put by the Dean. This can only be settled by legal philosophy, to which, the Dean explains, it cannot be assumed that there is only one significant approach.

Professor Max Radin, in his essay, "A Juster Justice, a More Lawful Law" (pp. 557-64), points out a line of approach to law which is often lost sight of in Anglo-Saxon countries, "that is the recognition that the ultimate end of law is Justice." It is perhaps an Anglo-American trait to dislike any appearance of "preaching," and it may be this that causes our courts to admit only "a little shamefacedly," and from time to time, "that justice was what they dimly had in mind."

But the "slot-machine theory," as both Radin and Pound have shown, is now no longer popular. Gény has pointed out that when assessing the value of a precedent its social background must be taken into account. Following Mommsen, Radin brings out the importance of sound philological method and linguistic history when judges seek to determine the meaning of traditional expressions. The meaning of words is apt to change just as much as the social background in which they are used. As an illustration of this, Professor Radin gives a brilliant account of the history of the notion of equity, tracing it from Greek and Scholastic

notions to those of Lord Eldon, who finally "mechanized" the concept. But as we have hinted on a previous occasion, it is possible that a revival of equity is on its way, for "slot-machine" equity is worse than "slot-machine" law.

In much the same vein as Professor Radin, Mr. Francis H. Bohlen points out in his essay, "The Reality of what the Courts are Doing" (pp. 39-49), that: "The failure to recognize that many of our legal principles and rules deal with the creation of instrumentalities or tools to accomplish a desired result, has had . . . a highly undesirable consequence. A tool has no value as a thing in itself: it is a means to accomplish an end." And again: "The idea that a single word carried with it always a unitary connotation has made immense trouble in other fields."

If law is an instrument of justice, justice is inevitably mixed up with ethics.

In his "Law and Morals of Primitive Trade," Mr. Frank I. Schechter (pp. 565-622) points out with a wealth of curious illustrations that even very rudimentary systems of civilization exhibit a well-organized and highly ethical system of quasi-legal commercial custom. We may observe that the custom of the Philipinos exhibits a higher standard of commercial obligation than that adopted in *Ward v. Hobbs* (p. 579); the Ashanti do not permit any statutes of limitation to lessen their sense of obligation; the Kafirs have a more stringent obligation to their guests than that recognized by the Innkeepers' Act; the Omaha Indians recognize the strict obligation of the *mutuum*; the Aleuts and the Melanesians recognize intermediaries in much the same way that French peasants negotiate loans through a notary; while notions similar to that of the "just price," which we are beginning to attempt to recognize in price-controlling legislation such as the Railways Act of 1921, are widespread in primitive communities. There is, of course, the reverse side of the medal, but the reader will see for himself.

M. Louis Jossierand discusses, as a French legal philosopher, "*La protection des faibles par le droit*" (pp. 221-43). He has indeed many points of contact with other contributors. When he deals with the "*prodigue*" and the big corporation, we can discern considerable sympathy with the attitude taken up by Mr. Costigan in his essay (p. 227); when he discusses the function of equity (p. 231) we are irresistibly reminded of Max Radin's contribution; when he discusses the disassociation of risk from fault in relation to motor-cars (p. 236) we can see a similar reasoning operating to that evident in Mr. Bohlen's work (p. 44). And this is not all; the account of the development of a French doctrine something like our "*res ipsa loquitur*" will be of particular interest to the common lawyer. The whole theory of the need of law to preserve an equilibrium among the various forces of the modern world is admirably developed in this article.

Finally, we must draw attention to Mr. Hersel E. Yntema's article on the American Law Institute (pp. 657-94).

The Institute has received considerable attention in this country of late, especially since Professor Goodhart's account of its work was given at the 1934 meeting of the Society of Public Teachers of Law. Not only does Mr. Yntema give a full account of the Institute, its history and forerunners, but he also ventures a little constructive criticism of its present working. Even if "the character of the restatement has precluded effective consideration of the philosophical theories and social necessities expressed in the development of legal doctrine," he is careful to point out that "a more scientific definition of the common law cannot fail to promote the march of critical analysis and the adjustment of the legal system to modern conditions."

It is clear from this volume of essays that some far-reaching efforts are being made at the present day to achieve the analysis and the adjustment of law to modern conditions. For this reason alone this collection will form a valuable addition to any law library.

B. A. WORTLEY.

CIVILISATION AND THE GROWTH OF LAW.¹

"It is scarcely too much to say that jurisprudence hardly exists in Great Britain. Philosophy and law are barely on speaking terms, while sociology and law are strangers who have never even met." Dr. Robson, in his book on *Civilisation and the Growth of Law*, has done as much as can be expected of any individual to remove this reproach which he levels at English law to-day. He has not only bridged the gulfs between law, philosophy, history and sociology, but has dispelled any lingering illusion in the minds of his readers that law is a dry-as-dust subject. His book treats of the nature of law, its place in human history, and the outlook for society to-day: a large subject, but to the scholar and the enthusiast all things are possible. He has succeeded brilliantly in his inquiry. He deals in a masterly fashion with voluminous material; there is scarcely a thinker of any import in the past who does not find a place in his pages, and the footnotes of all his references tempt the reader to wander off on any side-road that attracts his attention, literary, historical, economic or philosophical. His summaries are impartial but always trenchant, weighty in scholarship but always lucid in style. He has, in short, written one of those rare books which satisfy the claims of scholarship and yet open the doors of learning to the reader who is inexpert but anxious to think soundly. The complexity of modern life, and the challenge to freedom in all its senses from "the pathological despotisms" of the twentieth century and the more subtle forms of tyranny that beset us, should bring men back to the study of law. Nothing could conduce more to such an end than to begin with Dr. Robson's book.

Part I, which includes nearly half the book, deals mainly with the origins of law, and concludes with the emergence of the nation state and

¹ By William A. Robson. (London: Macmillan & Co.) Pp. xv + 354. 12s. 6d.

the sovereign legislature, which alone prevents a society from becoming static. It thus covers the period in history in which the conception of law was bound up with the idea of a divine authority: the result was an attitude of mind in which fear prevailed and which made real development impossible. These characteristics were present equally in Greece, Rome and medieval Europe, different in detail as these societies were. The last chapter in this section deals historically with the transition to the sovereign legislature, and reviews the development from Athens to the English Revolution of 1688. The historian will appreciate the masterly summaries and the power of selection which Dr. Robson shows, but he may regret that more space was not given to this aspect of the subject at the expense of some of the more discursive chapters in the earlier part of the book. The paragraph on p. 169, for example, which deals with the powers of the medieval king, warrants a little more discussion. The later Plantagenets would surely have questioned some of the implications; in practice they certainly did not all regard themselves as merely giving effect to the command of the people, and as for Sir John Fortescue, he spent the middle years of his life in exile on a charge of high treason. Again, in dealing with the emergence of the sixteenth- and seventeenth-century sovereign-states, Dr. Robson hardly refers to the Reformation, and in connexion with the theory of the divine right of kings he does not mention the enormous influence of the Old Testament on the civic outlook of the people in non-Catholic districts. One very interesting assertion is made in this chapter: that nationality is the product of sovereignty and not the cause, as historians so frequently imply. But in suggesting that the realization of sovereignty is antecedent to that of the nation, it becomes even more difficult to relegate a king like Edward I to an inferior position with regard to the law.

Part II deals with the Law of Nature, a difficult subject, but treated with a lucidity and power which could not fail to arouse and hold the interest of the most casual reader. After dealing with "the scheme of the world" and various conceptions of nature which have been held, a brilliant chapter on the Law of Nature sketches the history of the phrase and interpretations of it. Dr. Robson grasps very fully the trend of Hobbes's thought in this connexion and the contribution he thereby made to the secularization of thought. In the history of men's ideas the seventeenth century should get far more emphasis than it commonly receives from the history text-book. The spectacular achievements of the fifteenth- and sixteenth-century pioneers, with their wide economic and political consequences, have led us to give them a significance which is not unmerited, but which is unjustly denied to the thinkers of the seventeenth century. The modern mind, by which we mean the attitude of the twentieth-century thinker to the world around him, has nothing in common with Luther and Copernicus, but much with Hobbes and Newton. The following chapter on Natural Rights begins with a discussion of the terms *natura* and *lex*, Latin mistranslations of the

Greek *physis* and *nomos*, an interesting and not irrelevant point in view of the influence of Rome on Europe. Dr. Robson maintains that the word *natura*, which suggests origin, obscured the conception of the world as a kinetic process and hindered the development of scientific thought. The word *lex* expressed the idea of covenant or contract, and hence the Law of Nature was logically the parent of the doctrine of Natural Rights. He bewails the loss of that doctrine in English law in the nineteenth century—partly the fault of Bentham—which has helped to bring about the divorce between law, philosophy and history.

Part III connects the first two by a discussion of the relationship between human society and external nature. Illustrations such as the modern motor industry show the connexion between scientific development and the growth of laws to regulate the conduct of society. Increasing knowledge and control over Nature demand a corresponding expansion of the legal system. Nature, far from supplying laws, demands them: nature is orderless, man is orderly. "Man appears to be a more law-abiding creature than the modern Schrödinger atom," says Dr. Robson. This is his final judgment on the trend of contemporary thought: on the human will rests the responsibility for good laws and for the type of society that is to be evolved. Everything depends on man, who is free and not a mechanism, and thus freedom is found to be coincident with the idea of self-control. At this point speculation begins, and Dr. Robson ends on a hopeful note. Man freed from fear and from the conception of natural laws which are of immutable validity is after all the arbiter of his own destiny, but that augurs well for the future, for man free is man at his best.

G. M. JERRED.

CIVIL SERVANTS IN AMERICA AND ENGLAND.¹

A YEAR ago in America an almost official Commission of Inquiry reported upon the personnel employed in public service in the United States. It demanded an entirely new policy of selection and appointment. For Federal, State, and local government personnel it recommended a "career-service" system with competitive entrance, advancement on merit, substantially increased salaries for posts at the top, and adequate retiring allowances for all classes. The Commission asked itself why some 175,000 units of government in America, employing some 3,250,000 public servants and spending some 4,500,000,000 dollars on their annual salaries, failed to attract the best men. It found the answer in the spoils system, the use of the public pay-roll for charity, indiscriminating criticism of public employees, and "the failure to adjust our ideas, our governmental

¹ *Better Government Personnel*, the Report of the Commission of Inquiry on Public Service Personnel. 1935. 12s.

A Bibliography of Civil Service and Personnel Administration. By Sarah Greer. 1935. 12s.

Training Public Employees in Great Britain. By Harvey Walker. 1935. 15s.
(All published by the McGraw-Hill Publishing Co., London.)

institutions, and our public personnel policies to the social and economic changes since the Civil War." The report vigorously attacked certain fallacies in American thinking—the idea (to which President Jackson gave currency in 1829) that the duties of public employees are so plain and simple that a man of intelligence can easily qualify himself for their performance, the idea that public service must needs be less capable and efficient than private enterprise, the idea of "home-town jobs for home-town boys," and the idea that reform should begin with the lowest instead of the highest grades. It is the higher-paid positions that are the more tempting objects of political patronage; it is to these that the application of the career-service system is most urgent. Thus, of the United States postal service we are told that post offices are classified in four categories according to the volume of their receipts. Offices of the first, second, and third classes are still outside the Civil Service and their post-masters are political appointees. Under Republican administrations almost all the appointments are confined to active Republicans; under Democratic administrations the reverse is true. Exceptions, declares the Commission, merely prove the rule; a system of qualifying examinations, undergone by the politically appointed candidates, has lowered the prestige of the Civil Service Commission in America. The introduction of a career-service is expected to deprive the politicians of their twin weapons of jobs and favouritism; it is hoped that even the politicians will accept the reform if it disarms their political adversaries as well as themselves. If large-scale patronage for rewarding adherents and conciliating opponents has hitherto enabled Presidents to organize the support indispensable to the conduct of government, its surrender raises problems which we need not here pursue.

The New Deal and the institution and development of social services in the traditionally individualist atmosphere of the United States have stimulated American investigations of the staffing and efficiency of the public service. Among the materials collected in connexion with the Commission of Inquiry is Miss Sarah Greer's bibliography of publications on civil services in all parts of the world. Perusal of her careful catalogue inspires the thought that the ideal book on the British Civil Service has not yet been written, though the sectional accounts of the separate departments in the Whitehall series partly fill the gap. In this same connexion a monograph on *Training Public Employees in Great Britain* has been prepared by Mr. Harvey Walker, professor of political science in the State University of Ohio. He has discussed his topic with our Civil Service Commission and our Treasury and has interviewed the establishment officers of some eighty Government departments in London and Edinburgh. Lookers-on see most of the game, and Mr. Walker tells us what he saw, adding his own comments and suggestions, though modestly conscious that American scales may ignore the imponderables of British tradition and precedent. He devotes separate chapters to the five standardized groups of our civil servants, from the administrative class at

the top to the shorthand typists at the bottom. It is the topmost group that matters most, and here are the indictments framed by a foreign observer against our administrative class:—ignorance and indifference in respect of the affairs of the outside world and the activities and policies of other departments, and failure to consider public administration as a science with a body of fundamental principles. He convicts British civil servants of treating their method as a mystery revealed only to the initiated, or alternatively as a gift denied to all who are not blessed with it at birth. They have, Mr. Walker submits, no training; they just “learn by doing”—the Squeers method. The entrance tests are those of a general education. Any honours graduate of a university can compete on the strength of studies recognized by the academic curriculum—classics, mathematics, history, and so on. There being “nothing like leather,” the professor of political science quickly detects the absence of specialized training in governmental theory and practice. Mr. Walker concedes that the British plan selects the best of the examinees, but he sees the young men slip out of the cloistered life of the university into the cloistered life of the civil service without making contact with the business world. His suggestions embrace preliminary aptitude tests and lectures in departmental classrooms, where the lecturers will be selected civil servants struck off all other duties while so employed. Mr. Walker believes that, if the Government cannot arrange with one of the universities for the courses required, it must set up its own school in Whitehall. The learners would go to their lessons in the morning and would work in their departments in the afternoon. He sketches for them a curriculum of studies more ardently pursued in America than here—governmental technique and research, statistical method, business organization, and the interaction of public opinion and political processes—not only as a propædæutic before entrance but as a continuing preparation for promotion. Though useful instruction of a technical kind is already successfully given in some fields of the British service, the conservatism of our system may be slow to experiment with Mr. Walker’s full programme. Administrators everywhere are admittedly fallible. *An nescis, mi fili, quantilla prudentia regitur orbis?* Axel Oxenstierna’s classic question to his son is sometimes misquoted. His word was *prudentia* not *sapientia*; it was the wisdom, not the science, that he found so rare.

C. T. C.

INTERNATIONAL ACADEMY OF COMPARATIVE LAW.

THE first volume of the Acta of the Academy of Comparative Law was published in Berlin in 1928, and contained details of the proceedings of the Academy at their annual meetings in 1924 to 1926, together with a series of articles on varied topics by the Academicians. The new volume of Acta ¹ is in four parts, and contains in all some 2,600 pages. The first

¹ *Acta Academiae Universalis Jurisprudentiæ Comparativæ*. Vol. II. *Quod illius auspiciis curavit Elemér Balogh*. (Recueil Sirey, 1934-5.)

part is mainly concerned with the Academy itself, and in the first 460 pages we find details of the meetings of 1927 to 1933, including contributions by members of the Academy on various topics, some of very great interest. In particular we may mention that of Dr. Walton on "The Historical School of Jurisprudence and Transplantations of Law," that of Professor Altamira on "Le Droit coutumier contemporain en Espagne," and that of Sir Alexander Wood Renton on "Foreign Law in the British Empire."

The remainder of Part I and all the three succeeding parts are devoted to the proceedings of the Congress of Comparative Law held at The Hague under the auspices of the Academy, August 2-6, 1932.¹ All who had the privilege of attending the Congress will be very grateful to Professor Balogh for the untiring care and diligence with which he has edited these proceedings. Here we have collected the speeches delivered at the opening ceremony, the addresses given by the Presidents of the various sections and the *rappports* presented by those charged with the duty of examining the material placed at their disposal by experts in every quarter of the globe. We have also Minutes of the discussions which took place upon the questions presented for the consideration of the sections. The editing of this mass of matter in English, French and German reflects the highest credit on Professor Balogh, and the whole publication will be for many years to come a mine from which material of the greatest value can be extracted by students of comparative law.

The presidential addresses include that of our chairman, Lord Macmillan, on "Scots Law as a Subject of Comparative Study," that of Lord Justice Greer on "The Cancellation or Dissolution of Treaty Obligations" and the inaugural discourse of Lord Hanworth on "The Remedy and Procedure of Specific Performance in English Law." These among many others.

It is not possible here to do more than specify a few of the subjects discussed at the Congress upon which *rappports* by the most eminent authorities are to be found in these pages. All branches of legal knowledge and practice are represented, and few of the best-known names, in the contemporary academic sphere at least, are wanting among the contributors. Thus in Section I the Sources of law are treated in two *rappports* by Dean Pound (Harvard) and Professor Del Vecchio (Rome), the Roman and Teutonic elements in modern legal systems in *rappports* by Professors Colvin (New Orleans), Claudius von Schwerin (Freiburg) and Egon Weiss (Prague), and the historical relations of law and religion by Professors Aly M. Badawi (Cairo), Jarra (Warsaw), Maunier (Paris) and Pöschl (Graz). In the field of Commercial Law, Copyright is made the subject of *rappports* by Dr. Feder (Berlin), Sig. Piola Caselli (Rome), Dr. Raymond Weiss (Paris) and Mr. H. D. Williams (New York), and Bank Credits by Professors Escarra (Paris), Gutteridge (Cambridge) and Klausing (Marburg). In the section treating of Public Law, we find

¹ *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 244 ff.

rapports on Execution of Foreign Judgments by M. Arnaud (Paris) and Professors Gidel (Paris), Sperl (Vienna) and Yntema (Johns Hopkins).

These examples sufficiently indicate the variety of subjects treated, and the calibre of those contributing. It is many years since a body of legal writing of such wide authority has been published. In another place in this number we publish a programme of the second Congress which it is hoped will be held at The Hague in 1937, and which there is every reason to believe will be as brilliant a success as that whose proceedings we are now recording.

AMERICAN FAMILY LAWS.

THIS is the third volume¹ of a remarkable compilation, the subject-matter of which is a comparative study of the legislation governing Domestic Relations in the fifty-one jurisdictions of the United States—that is to say, in the forty-eight States, in the District of Columbia and in the territories of Alaska and Hawaii. The first volume, which appeared in 1931, dealt with marriage, and therein of breach of promise and of nullities; the second, which appeared in 1932, dealt with divorce and separation; while the present volume deals with “husband and wife,” and purports to be corrected up to January 1, 1935. The subject is treated under eighty-two headings, such as “wife’s antenuptial debts and contracts,” “wife’s contracts with husband after marriage,” “wife’s torts,” “wife’s real property acquired after marriage,” “wife’s power to make will,” “husband and wife as witnesses for and against each other.” Twenty-seven sections are devoted to various branches of the law of dower, and nine to the law of curtesy. A general introduction gives an interesting survey of the principal tendencies of American legislation in this domain, from which the following particulars may be quoted. Twenty-three jurisdictions impose a statutory obligation upon the wife, converse to the common law duty of the husband to support spouse and children. The common law inability of husband and wife to contract with each other has been removed in sixteen jurisdictions by statutes expressly permitting such contracts. In most of the others the same result has been reached by statutes conferring upon a wife the general power to make contracts. In the majority of States the common law liability of the husband for the wife’s premarital torts and contracts has been abrogated. One State, Georgia, has expressly codified the ancient common law rule making the husband liable for the wife’s torts. In only nineteen of the States are there statutes dealing with the common law presumption that a wife committing a crime in the presence of her husband was acting under his coercion, and in only three of the nineteen is the rule wholly abolished. Eight of the States, namely Arizona, California, Idaho, Louisiana, Nevada,

¹ *American Family Laws*, by Chester G. Vernier, assisted by John B. Hurlbut; vol. III. (London: Humphrey Milford, Oxford University Press. Pp. xxix + 684. 30s.

New Mexico, Texas and Washington, have adopted the *régime de la communauté* as governing the property rights of the spouses; they are presumably States, the original settlers in which were familiar with the French or the Spanish law. The editor of the volume before us speaks of this ancient and world-wide system as "this odd creation of the civil law." He goes on to say that "in spite of a common origin the community-property system varies greatly in these eight States; furthermore, the courts have developed radically different conceptions of the system even where the statutes are substantially similar."

It may be hoped that this admirable work may be completed by a further volume dealing with the law of parent and child. It is perhaps Utopian to dream of a similar work dealing with the family legislation of the British Empire.

M. S. A.

THE GOLD CLAUSE.

M. MARTIN DOMKE, in his admirably documented and indexed work *La Clause "Dollar-or,"*¹ has not undertaken an impartial study of the gold clause in money bonds. He has written a plea urging that as, in his view, gold clauses contained in dollar bonds issued in America, and gold clauses contained in loans raised outside America in terms of gold dollars, are legally enforceable, action should be taken by subscribers to such loans to enforce their rights in those cases in which debtors do not recognize their obligations.

M. Domke rightly points out that the problems raised by gold clauses in international money loans are not merely legal problems, but issues of first-class political, economic, and social importance, and that the future of international finance will to some extent depend upon the satisfactory solution of these problems. He maintains, and is to some extent supported in his arguments by judgments of the Hague Court and the French Court of Cassation, that so long as the gold clause remains a question affecting only nationals of one country, public policy and internal currency laws may demand its abrogation, but that where the gold clause becomes a problem affecting nationals of different countries and thus is of international importance, it cannot be affected by national legislation. In such cases, M. Domke argues, the question must be decided according to the rules of international law, and not by judgments determining the constitutionality of American legislation. He urges the necessity for international action against the repudiation of the gold clause.

Though M. Domke may over-emphasize the extent of the repercussions of the joint Resolution of Congress abrogating the gold clause in America, it is clear that the widespread moves of currency devaluation, and the national legislation which has brought this about, have raised problems of more than mere juristical importance, of which the repudiation by the American courts of the gold clause is one.

M. Domke's arguments, whereby he maintains that American legisla-

tion abrogating the gold clause is not applicable to dollar bonds issued outside America, are very forcible. We have, however, been unable to find any very practical suggestions of means by which bondholders may secure the recognition and enforcement of their rights.

The Hague Court is not open to actions by private individuals. M. Domke suggests that the national associations formed for the protection of bondholders should have the support of their respective Governments, but in view of the fact that the majority of world Powers have abandoned the gold standard, such support appears somewhat unlikely.

The second problem considered is that of the effect of gold clauses contained in loans or sections of loans issued in gold dollars outside America. It is argued that a joint Resolution of Congress cannot be applicable to such loans, and that in any event, unless the instrument whereby the loan is issued specifically provides that American law shall apply, *lex loci contractus* is applicable to such a contract. With these arguments we agree. It will be interesting to see whether the various national tribunals reach similar conclusions as they are called upon to determine these questions.

Whatever may be the practical limitations of M. Domke's book, it is an important contribution to jurisprudence relating to the "Gold Clause."

JOHN MATHIAS.

CONFLICT OF LAWS ON BANKRUPTCY.

THIS is a new edition¹ of the author's original work on the subject published in 1894. It is an ambitious and, on the whole, successful attempt to present the Conflict of Laws on Bankruptcy on a comparative basis. The author, however, deals with only two systems in detail: those of France and Belgium on which his work is intended to furnish an authoritative text-book. The scheme followed is to present on each branch of the subject a discussion of the general principles upon which rules for the settlement of conflicts of laws in bankruptcy may be based, and to follow this up with an investigation as to which of these principles are followed, and how far, in the jurisdictions of the various nations in Europe and America, with, as has been stated already, a detailed analysis of the French and Belgian position. The various attempts which have been made to bring order into an exceedingly complex situation by means of international conventions are then examined in some detail—an important feature.

The most important theoretical question involved is that of whether an insolvent debtor should be made bankrupt and his estate dealt with in compartments territorially, *i.e.* state by state, or universally upon a unitary principle. M. Travers is a convinced adherent of the latter view, and gives many cogent arguments in support of his thesis. Actually a

¹ *Le Droit Commercial International*, No. 7, *Faillite et Institutions Analogues*, vol. i. Par Maurice Travers (avec table analytique des matières). (Paris: Librairie du Recueil Sirey). Pp. 501. 60 francs broché ou 80 francs relié.

vigorous application of the territorial principle is not practically feasible, but neither in the present organization of society upon a nationalistic basis is the unitary. The problem, as is usual in private international law, is to find a *modus vivendi*, and the glimpses which the author affords us of the laws on the subject in different states shows in an interesting way how this has been achieved. Although the tendency has been for the various nations to base their codes upon a territorial basis this has been counteracted in practice by the realization that a good deal of give and take is necessary. This is perhaps best exemplified from the case of Great Britain where a very wide discretion has been exercised by the judges. It is interesting to note that M. Travers views this method with wholehearted approval, stressing its wonderful suppleness, adapted to the needs of commerce rather than inspired by philosophic conceptions.

In the actual administration of bankruptcy law, however, the state engaged upon the work must, of course, apply its own procedure and rules. There is, nevertheless, a considerable resemblance between the practice in the various jurisdictions, and an analysis usually shows that the whole matter can be reduced to a comparatively small number of systems. This branch of the subject tends, therefore, to become an essay in comparative law, and is conducted by the author with wide knowledge and ability. This section is largely occupied with a consideration of the consequences of bankruptcy, using the word consequences in a wide sense, and with the international conventions dealing with the subject.

A perusal of this volume naturally attracts attention to interesting differences between the various national systems. To consider one of these for a moment we may take the conditions which must exist in order that a person may be made bankrupt. In the first place, bankruptcy is still in many countries a privilege of the mercantile classes, but the tendency to extend it to all citizens which appears to have originated in this country is extending. In the second place, there appear to be in operation three main types of condition precedent to an adjudication of bankruptcy. The English method of requiring one or other of certain concrete sets of circumstances to exist, *i.e.* acts of bankruptcy, has not been much followed. M. Travers would apparently regard it as too hard and fast. The French system, which is widely followed, enables the court to make an adjudication as soon as a merchant is found not to be paying his debts. This, according to our author, enables the position to be safeguarded at an early stage while leaving to the court a sufficient discretion for the protection of a debtor who is clearly only temporarily embarrassed. One would like to know more about its working in practice before subscribing to this view. In the U.S.A., some Scandinavian countries, and elsewhere, actual insolvency must be shown to exist before adjudication. This theoretically correct precondition is subject to the great disadvantage that it gives time for the debtor to get rid of his assets. A detailed practical survey of the three systems in work would clearly be of great utility.

The reviewer is not competent to criticize M. Travers on points of detailed exposition. He has, however, been everywhere struck by his wide reading, and the knowledge which he displays of the English law is on the whole substantial and accurate. There are naturally a considerable number of minor errors, *e.g.* the Companies Act, 1908, is referred to throughout as being still in operation, but we have noticed no error of real substance.

R. S. T. C.

FOREIGN LEGAL SYSTEMS.¹

THE previous volumes of this series on Belgium, Czechoslovakia, France, Rumania and Spain have been reviewed in these columns.² They follow a uniform scheme. The law is divided into eight branches—Constitution, Administration and Finance, Actions against the State, Penal Law, Family, Property and Labour, Commercial Law, Civil and Commercial Procedure, and International Law. Each branch is treated of by a specialist belonging to the country itself. This method gives to these volumes a high degree of actuality and of authority. It involves, no doubt, considerable labour for the editors—Professors Lévy-Ullmann and Mirkine-Guetzévitch—but the result is most satisfactory.

The volume on Switzerland is of special interest owing to the peculiar history of that country. When Lord Durham wrote his famous Report on Canada in 1839 he described that country as two nations warring in the bosom of a single state, a condition of affairs which, happily, has long ceased to exist. Switzerland, on the other hand, shows us three nations living at peace within a single state, and that under the most democratic form of government. The learned editors of this book hardly go too far when they call the unity of Switzerland an historical miracle. A country with not many more square miles than Denmark (but what different miles!), with a population not much over four millions, divided politically into twenty-two little states, united to form a Federal Republic, that would be surprising enough. But when, over and above this, we know that in some of these cantons French predominates, in others German and in one Italian, that some are Catholic and others Protestant, that each canton has its own traditions and jealously guards its own independence, we wonder indeed how the unity has been preserved. How have the three peoples who inhabit Switzerland managed to live together in amity, not crushing any minorities and preserving tenaciously the civil and religious liberties of all? This book helps one to understand how this feat has been accomplished. The history of Switzerland is an example for European statesmen to study, and the time may come when they are able to profit by the lessons which it teaches.

No doubt, in modern times, the cantons have had to surrender some of their independence. They still say they are "sovereign," but their

¹ *La Vie Juridique des Peuples*, No. vi, Suisse. (Paris, Delagrave, 1935.) Pp. xiii and 435.

² See Third Series, vol. xvi, pt. iv, p. 338.

sovereignty has been a good deal limited. Fortunately for Switzerland, the Swiss have not been led astray by any wild ideas about "race." They know that some Swiss are German, some French and some Italian, but they are all Swiss and all entitled to the same consideration.

To the student of comparative law the Swiss Codes are specially interesting for the manner in which the codifiers compared rules and customs prevailing in different cantons and laid down rules which without too much friction might be applied throughout the territory. The technical merits of the Swiss Codes—their clearness of language, the simplicity of their arrangement and the general air of good sense which pervades them—are well known. If proof were needed, what more striking evidence could be found than in the fact that the Swiss Codes have been adopted almost *holus-bolus* as the laws of the new Turkey? The Turks wanted to get rid of their old laws and to find new ones. The world was all before them where to choose, and they chose the Swiss.

F. P. W.

LIBELLARY PROCEDURE.

THE first part of this article¹ is in substance a review of Collinet, *Études historiques sur le droit de Justinien*, Tome IV, *La Procédure par Libelle*. In some matters of importance the author agrees with the results of Professor Collinet's researches, as, for instance, in making a clear distinction between two phases of the introductory procedure: the first, in which the parties themselves state their cases on the facts, and the second, in which their advocates put the opposing contentions in legal form. He also accepts the view that the libellary system originated in the type of procedure used for privileged cases, especially procedure by rescript, and that it was generalized between A.D. 474 and 486 or 487. In other matters, however, Professor Balogh is more conservative. One surprising thesis put forward by Professor Collinet is that in summoning the defendant the officer of the court not only served on him a copy of the *libellus* and of the citation, but also informed him of the name of the action which the plaintiff proposed to bring, and that this process was the first or extra-judicial *editio actionis* of the libellary procedure. Professor Balogh (like Professor de Zulueta in his review, L.Q.R. XLIX 275-8) denies that there was any need for such notice, and it must be admitted that some of the arguments in its favour are rather frail, but at least Professor Collinet does manage to account for the incorporation of the passage from Ulpian dealing with *editio actionis* in Digest 2, 13, 1, whereas Professor Balogh, like most other authorities, has to say that, having been written of the formulary system, this passage has no sense when applied to the libellary procedure. *Postulatio simplex* is another puzzle. Professor Collinet, with great subtlety, argues that it refers to the statement of the plaintiff's advocate made at the beginning of the second stage of the procedure, and

¹ *Beiträge zum Justinianischen Libellprozess*. By Professor Dr. Jur. Elemér Balogh. Estratto dagli "Studi in onore di Salvatore Riccobono," vol. ii, pp. 449-519. (Palermo, 1935.)

that it is called *simplex* (μονομερής = unilateral), not because it is used only when the defendant does not appear, but because in the libellary, as opposed to the formulary procedure, it takes effect whether the defendant is present or not. For Professor Balogh, on the other hand, *postulatio* is the clearly unilateral act of presenting the *libellus* to the court. It is true that the word originally implied asking for a legally defined remedy, and that the *libellus*, as he agrees, does not do this, but the name remains over from the earlier system to which it was appropriate. Professor Balogh also rejects Professor Collinet's view of *litis contestatio*, i.e. that it took place, as would appear on a literal interpretation of Codex 3, 9, 1, at the moment when the plaintiff makes his *narratio*, or first statement, and was independent of the *contradictio* of the defendant; but the discussion of this highly complex matter would take us too far.

The remainder of the article, headed "Randbemerkungen zur Frage der Appellation," is not specially concerned with the libellary procedure, but gives an account of some of the main features of the Roman appellate system as it grew up from the beginning of the Empire. We must admit inability to follow the argument on p. 503, where a statute of A.D. 319 seems to be quoted against the assertion that after A.D. 321 all appeal to the Emperor was by way of *consultatio*, but the amount of information on a complex subject contained in these pages is astonishing. Some readers of this *Journal* will perhaps be surprised to learn that the author whom they know so well for his services to comparative studies is also an expert in ancient law.

H. F. J.

DOUBLE TAXATION.¹

THE book is one of the publications of the Institute for Foreign and International Private Law in Berlin. The author deals with the problem of "double taxation," which arises when an individual or a company is liable to pay (say) income-tax twice in regard to the same income, because he resides, or the company is carrying on business, in two countries. He considers also the question whether relief can be given, or how such double taxation can be avoided. The author does not deal with the principles which are involved, but rather with the technical questions such as definitions. These are of importance since "income-tax," "residence," "domicile" and the like are conceptions understood and defined differently by different systems of law.

The author has taken great pains in investigating numerous systems of law. He quotes their requirements, and elucidates their interpretation and the judicial practice in regard to the problem. The book is thus neither a theoretical investigation of the principles of double taxation nor is it a book of immediate practical use. The quotations from the different systems of law serve only as examples. The essay is written

¹ *Beiträge zum Problem der internationalen Doppelbesteuerung, die Begriffsbildung im internationalen Steuerrecht.* By Dr. Wilhelm Wengler. (Berlin and Leipzig, 1935: Walter de Gruyter and Co.)

as a study preparing the way for a larger work, its task being to define the fundamental conceptions.

The author does not favour general treaties, open to all nations who choose to adhere to them. The difficulties and differences of law appear here to be too great for such a solution to be practical. Consequently the conclusion of separate agreements between States is alone possible.

The theoretical examination of the international law relating to taxation is of importance also in regard to the study of private international law, and this aspect is rightly emphasized by the author.

Though the book does not contain new ideas nor indeed mentions new methods of dealing with the problem, it may yet serve a useful purpose as a competent study of the subject. It would gain in value by a simplification of its style. It is not easy reading, and this will detract from its utility to foreigners.

RUDOLF GOTTSCHALK.

FOREIGN BONDHOLDERS.

THE unfortunate situation of holders of foreign state bonds is a well-known and indeed a burning problem of our times. Government restrictions of various kinds and degrees have all over the world done their best to take away as much of their claims and rights as seemed good to the discretion of the governments and have left them in no few cases with nothing except a valueless scrap of paper. There can be no doubt that Great Britain, the foremost creditor country of the world, has suffered most from the present state of international lawlessness which the creditor of foreign states or foreign public corporations and sometimes even the creditor of foreign private bodies have to face. Dr. Domke's small, but highly concentrated book¹ should therefore be of considerable interest to British readers. Dr. Domke's thesis that not only the economic crisis, but to a not lesser degree the lack of international protection is responsible for the very unfortunate position in which foreign bondholders are at present cannot be contradicted. Equally justified is his further view that national unions of bondholders, however valuable and even indispensable the services may be which they are able to render, are always under serious disadvantages, the most important obviously being the fact that they open the way to discriminations among the creditors which are not justified by reasons of either law or justice. Dr. Domke thinks that the only possible way to cope with the problems is an international organization unifying the activities of the various national associations and the erection of an international tribunal competent to arrange for a compulsory composition, for which purpose the Hague Permanent Court seems to be the best-suited institution. The weak spot in this interesting proposal is, of course, the question how force can be applied in case of need. The answer to the question whether and how this difficulty can be met

¹ *Internationaler Schutz von Anleihegläubigern*. By Dr. Martin Domke. (Wien: Manz'sche Verlags- und Universitätsbuchhandlung, 1934.) Pp. 60.

cannot, of course, be expected from scientific research. It is history alone which can and will give it.

ERNST J. COHN.

CURRENCY PROBLEMS.

THE instability of so many currencies has made a group of problems very important and of everyday occurrence which in former days did not occupy the attention of other than a few specialists and perhaps some theoreticians. These problems have become so urgent to-day that German lawyers have been able to form a technical term for them, which unfortunately is missing in English legal language. The word "*Valutaschuld*" has to be translated by nearly a whole sentence: it means a debt to be discharged in a foreign currency. There are a good many doubtful questions both of municipal and private international law which are concerned with such debts. To mention just a few: what is the importance of foreign currency laws or of a devaluation of the foreign currency for such debts? How far is a revalorization (*Aufwertung*) of foreign debts in devaluated currency possible in countries where debts in inland currency have become revalorized? Is it possible to set off a claim in foreign currency against a claim in inland currency or a claim in another foreign currency?

Dr. W. Mayer, in his book on *Die Valutaschuld nach deutschem Recht*,¹ deals with these questions in a very lucid manner. He has had the advantage of being able to rely on the works of such excellent authors as Professor Nussbaum and Dr. Eckstein, but his book contains original ideas, and is well worth attention for the sake of its clearness and brevity. Some problems of private international law, especially those relating to foreign currency restrictions, deserved more detailed study, and non-German legal literature, which might have been used more freely, would probably have afforded valuable suggestions. But these remarks are not intended to detract from the value of Dr. Mayer's work.

There is one particular point which deserves attention from the point of view of foreign readers. Dr. Mayer deals with the question of damages for breach of contract by non-payment of a debt in English currency, the contract being subjected to German law. He thinks that in cases where the plaintiff claiming damages is resident in Germany, he can claim damages for the devaluation of the pound, while a plaintiff residing within the British Empire could not do so, the internal value of the pound not having been reduced within the Empire. This seems to overlook the fact that if persons residing in the Empire go abroad, or deal with persons in other countries, they also suffer from the devaluation.

Professor Geiler, the editor of the series of monographs of which Dr. Mayer's book forms a part, has written a preface which is a model of what

¹ (Berlin u. Leipzig: Mannheim, 1934.) Pp. xii + 103.

prefaces should not be. It suggests a schoolmaster's terminal report, and is of no help either to the author or to the reader.

ERNST J. COHN.

JURISDICTION OF STATE AND FEDERAL COURTS IN THE UNITED STATES.

DR. SIEVEKING has written an interesting book¹ on the double jurisdiction of State and Federal Courts in the United States. After a very lucid and attractive description of the constitutional background of the problem and of the two judicial systems themselves the author deals with the legal relations between the two rival judiciaries, *i.e.* the problems arising out of the concurring competencies, the question of legal force of judgments and finally that of the binding force of precedents. Throughout the book the author has successfully endeavoured to compare American institutions with their equivalents in English and German law. German readers should, however, note that Dr. Sieveking appears to have overlooked the English Foreign Judgments (Reciprocal Enforcement) Act, 1933.

ERNST J. COHN.

PRIVATE INTERNATIONAL LAW.

THE last two decades in German legal literature are distinguished by the number of valuable monographs on private international law and comparative jurisprudence which have appeared therein. Even young authors have shown remarkable skill and—sometimes still more surprisingly—remarkable knowledge of foreign law and in the handling of those difficult problems which arise in private international law. Although for well-known reasons this stream seems to run less vigorously at present, it has not ceased. The present review comprises three new books under one heading not only because they all deal with private international and foreign law, but because all belong to the same "school," which has so greatly widened the sometimes all too narrow views of former times.

Dr. Duden's book² deals only with questions of German private international law and does not attempt to state and compare foreign private international laws in detail. But the author draws the material for his investigations from foreign substantive laws and his work shows that he commands an impressive knowledge of foreign laws and the methods of their application. The assignment of moveables is by German private international law governed by the *lex situs*. But the author

¹ *Die doppelte Gerichtsbarkeit in den Vereinigten Staaten von Nordamerika*. By Dr. Friedrich B. Sieveking. (Hamburg, 1935: Hans Christians Druckerei und Verlag.) Pp. 123.

² *Der Rechtserwerb vom Nichtberechtigten an beweglichen Sachen u. Inhaberpapieren im deutschen internationalen Privatrecht*. By Dr. Konrad Duden. Beiträge zum ausländ. u. intern. Privatrecht. Herausgeg. v. Institut für ausländ. u. internat. Privatrecht. Heft 8. (Berlin and Leipzig, 1934.) Pp. 137.

shows that this seemingly simple principle leads to complicated problems, where an assignment in good faith (Code civil franc., art. 2279, German BGB § 932, etc.) is in question. The most important and probably the most interesting part of the book is that which deals with negotiable instruments. Here the author has been forced to investigate and restate the main principle itself, since neither legal literature nor judicial decisions gave an accurate and complete answer. His solution is that the *lex situs* governs the instrument as well as the obligation embodied in it, but that the term "negotiable instrument" requires a qualification for the purposes of private international law. The discussion of the influence of the French Statute of June 15, 1872, on foreign laws is most interesting and lucid, as is the whole book, which is much more interesting than its title suggests.

Dr. Schoch's book¹ too deserves praise. It discusses the questions relating to the delimitation of right and remedy in the light of the conflict of laws. A thorough discussion of the problem of qualification leads the author to the conclusion that before the question of qualification in private international law can be raised it has to be determined whether the problem under discussion forms part of substantive or of adjective law, a qualification in itself which has to be made in accordance with the *lex fori*. This result is sound. The book is based on a great wealth of material, but its reading could have been made easier and pleasanter by a more logical arrangement of its contents and—sometimes—by a better grouping of arguments.

Dr. Achenbach's book² deals with a problem of extreme practical importance, that of the time at which the formation of a contract by correspondence is complete. It proposes to deal with the question both from the point of view of comparative law as well as from that of private international law, but the author's attention is almost entirely devoted to the latter, to an extent perhaps not quite in proportion with practical needs. Only twelve out of the ninety-eight pages of the book are concerned with the different municipal laws. The author's thesis is that the formation of a contract is complete at the moment when each party according to the law of its own domicil (in its continental sense) is bound. But he thinks that if it would be more favourable for a party to be bound, even when not bound according to his own law, the contract ought to be looked upon as binding at the moment when it normally would have become binding, notwithstanding the fact that according to the law of the party's domicil some obstacle has prevented it from becoming binding. The latter part of this principle is apt to lead to certain difficulties and, in spite of the interesting arguments put forward by the author,

¹ *Klagbarkeit, Prozessanspruch und Beweis im Lichte des internationalen Rechts* (Urkunden u. Forschungen zum internationalen Recht. Herausgeg. v. Mitgliedern der Hamburg. Juristen-Fakultät II). (Leipzig, 1934.) Pp. xvi + 160.

² *Der briefl. u. telegraph. Vertrag im vergleichenden u. internationalen Privatrecht* (Urkunden u. Forschungen zum intern. Recht, etc., III). (Leipzig, 1934.) Pp. 98.

it may be doubted whether it is good law either *de lege* or *de lege ferenda*.

ERNST J. COHN.

THE DOCTRINE OF NECESSITY.

WHILST in English Criminal Law the doctrine of "necessity" plays only a very small part, in Germany the monographs written on the corresponding conception of "Notstand" represent almost a middle-sized library. A few main problems concerning Notstand and the kindred conception of "Unzumutbarkeit" have already been briefly discussed in this *Journal*.¹ Dr. Maurach² points out (p. 3) that unanimity has now been reached about the solution of almost all practical questions, the remaining difficulties being more of a theoretical character. There is, for instance, the problem whether the same theoretical construction can be applied to all the forthcoming cases of "Notstand," or whether two groups are to be distinguished, namely, those cases in which the idea of Notstand offers a justification of the action as such, and those in which it may lead only to an excuse for the actor personally. The latter doctrine—called "Differenzierungstheorie"—predominates and is also followed by the Draft Code of 1934.³ This contrast is of practical significance in so far as, according at least to the prevailing opinion, self-defence is admissible against an act of excusable Notstand, whilst against an act of justifiable Notstand it is not. The author opposes this consequence, urging that even against actions of justifiable Notstand self-defence should be admissible (p. 101). He hopes that, in spite of this, a state of mere club-law may be avoidable.

The practical handling of the conception of Notstand is mainly dependent upon the relation of four values to one another: the value of the endangered "Rechtsgut," the degree of the danger, the quality of the counteraction and the particular position of the actor. The author points out that the views about the value of the various "Rechtsgüter" have changed under the influence of the National-Socialist régime and that these changes have far-reaching consequences for the application of Notstand (pp. 103 *et seq.*). The rights and interests of the State claim preference before those of the individual. In this connexion the author also deals with the conception of "Staatsnotstand" (actions of Notstand for the defence of the State). Finally, he examines the attitude of the Supreme Court of the Reich towards the idea of Unzumutbarkeit.

H. M.

CONTEMPT OF COURT AND SPECIFIC PERFORMANCE.⁴

THIS able and learned study exhibits the English law on these subjects, in relation to continental laws, and, more particularly, to the law of

¹ Vol. xvii, pt. iv, pp. 241 *et seq.*

² Dr. Reinhart Maurach, *Kritik der Notstandslehre*. (Berlin: Carl Heymanns Verlag, 1935.) Pp. viii + 154. RM.8.

³ See the translation in this *Journal*, Vol. xvii, pt. iv, p. 250.

⁴ *Il Contempt of Court e la Specific Performance nel Diritto Inglese*. By Dr. Michele Gaetano de Rossi. (London: Sweet & Maxwell.) Pp. xx, 369. 17s. 6d. net.

Italy. It can be read with much profit by English lawyers. The author's method—a very good one—is to give in the text his main argument and to relegate to the notes discussion on side issues. The references to authorities, English, American, French, German, Italian, and especially to the legal periodicals in all these countries, show how widely he has cast his net. He traces the history of Contempt of Court and of Specific Performance in English equity and shows how it compares with the rules of Roman law—classical and post-classical—and with the canon law. In spite of the numerous classes of cases in which the English Court of Chancery refused to order Specific Performance, it is clear that this remedy was a more powerful instrument than continental courts possessed. Only in modern times has it been found possible in some countries to attain similar results by other means.

In France, the courts do not in general enforce specifically the obligation to do, but by ordering the defendant to pay so much a day till he performs his obligation they break down his resistance. It is true that this form of judgment, imposing what is called an *astreinte*, finds no support in the codes, and is condemned by most writers. Nevertheless, it is firmly established.¹ But in other countries which have codes, closely similar to the French upon the subject of obligations the courts have not been so bold as in France. In Belgium, after some fluctuation, it seems to be settled that the courts will not impose an *astreinte*.² In Italy also the matter has been and still is much disputed. We could have wished that Dr. de Rossi had given us more information as to the Italian cases on the point, but his book contains so much that is valuable that it seems ungracious to note this small defect.

F. P. W.

CONFLICT OF LAWS.

To an English lawyer the Conflict of Laws is a branch of English law: it is an intensely practical topic and it is rooted in decisions of the courts. To the present author³ the Conflict of Laws is a branch of legal philosophy: he is concerned mainly with abstract ideas, and though he by no means shuts his eyes to their practical application, that aspect of the matter has only a subordinate place. Quotations from academic lawyers are numerous: citations of decided cases are scarce.

Perhaps the most interesting chapter from our point of view is that on the test of domicile (pt. iv, ch. 4). Dr. Scrimali (p. 307) is obviously chary of touching upon the English doctrine on this point, remarking merely that our definitions are "*numerosa e non uniformi*." He attributes this fact to the lack of a codified law, and has failed to realize (what hardly one English writer will tell him clearly) that we have two entirely different

¹ See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. i. p. 130.

² *La Belgique*, in *La Vie Juridique des Peuples*, p. 163. *Pasicrisie*, 1927, 1, 92.

³ *I Conflitti Interregionali di Leggi nel Diritto Internazionale*, Dr. Antonio Scrimali. (Palermo, 1935.) Pp. 398. L.30.

theories applicable to different circumstances, the "domicile of choice" and the "domicile of origin"—the latter being, except when it corresponds with the former, merely a fiction invented for the purpose of filling the *lacuna* in English law caused by the lack of a law of nationality. The point may be illustrated by saying that such a question as is propounded at line 6 on p. 319 would be impossible for us: so also would the quotation from Politis, p. 315, note 1. On p. 316, footnote, is a complete misunderstanding not only of our doctrine of domicile of choice, but also of Lord Kingsdown's Act and of another statute (long forgotten) of the same year.

Nevertheless Dr. Scrimali has much to say in favour of the test of domicile which is interesting coming from the home of nationalism in law. He sees clearly that a test of nationality is useless in dealing with the internal conflicts of *Stati Polylegislativi*, and that it is this fact which accounts for the importance of domicile in the British Empire and in the U.S.A. He points out that even Italian theory is forced to consider the test of domicile in such cases: and he is apparently ready to apply it (following a distinguished Italian jurist Diena) *non soltanto pei rapporti personali, familiari, successori, ma anche in relazione ad ogni specie di atti o di rapporti pei quali, secondo il diritto internazionale privato italiano, la cittadinanza potrebbe esercitare una qualche influenza*. It is a little difficult to be sure of all the implications of this sentence which is highly characteristic of the learned author's mental attitude, but it is capable of being construed as advocating an even wider scope for the test of domicile than English law admits. We do not, for instance, normally regard domicile as a factor of much importance in determining the proper law of a contract. It is true, Dr. Scrimali quotes on the other side the complicated test suggested by another Italian jurist, Salvioi; but there is no mistaking his own views. In this connexion he makes, on p. 313, the very interesting point that Switzerland in 1891 and Poland in 1926 deliberately adhered to the doctrine of domicile as the likeliest means of breaking down petty internal nationalisms within the borders of a single state. The foresight of Swiss statesmen on the former occasion has since been abundantly justified.

On p. 374, Dr. Scrimali quotes from the German writer, Zitelmann, the observation that it is the institution of marriage which translates inter-religious conflict from the spiritual to the juridical sphere. But in the rest of this chapter on *Conflitti Interconfessionali* he does not consider nor give a single instance of how the matter is to be decided where the parties, e.g., to a marriage are of different religions. What about a marriage between Catholic and Protestant or between Christian and Jew in Imperial Russia? The account of conflict of laws in Moslem countries in this chapter is, to say the least, superficial, and the whole chapter has the air of being a somewhat hasty and ill-considered postscript to what is in other respects a very interesting and careful piece of work.

THE STATE OF SIEGE

THE Faculty of Juridical and Social Sciences having decided to publish its own collection of books, has commenced with this book on *The State of Siege*,¹ by a well-known author. To introduce the subject care has been taken to discuss with some detail the natural rights of man, referring to the legislation and constitutional declarations of several leading countries, including the United States, England, France and Spain. Naturally, the chief part of the book is concerned with the State of Siege as an Argentine institution, the near parallel to which is the British Martial Law. The historical sketch includes the times before the independence of Argentina and deals with arbitrary as well as constitutional interferences with the guarantees of personal freedom, the former being described as extraordinary measures.

The work therefore covers a wide field of research and is a useful book of reference in comparative law.

W. A. B.

We have also to acknowledge:²

Primitive Law. By H. S. Diamond. (London: Longmans, Green & Co.) Pp. x + 451. 25s.

The Assyrian Laws. By G. R. Driver, M.A., and John C. Miles, Kt. (London: Humphrey Milford, Oxford University Press.) Pp. xxiv + 534. 35s.

Banking and Bills of Exchange. 5th ed. By John D. Falconbridge. (Toronto: Canada Law Book Co.) Pp. lxxv + 1030. \$12.

The Australian and New Zealand Society of International Law: Proceedings. Vol. I. (London: Humphrey Milford, Oxford University Press.) Pp. xxvi + 188. 10s. 6d.

Patents and Gebrauchsmuster in International Law. By Emerson Stringham, J.D. (Madison, Wisc.: Pacot Publications.) Pp. 538.

Before the War: Studies in Diplomacy. Vol. I., *The Grouping of the Powers.* By G. P. Gooch, D.Litt., F.B.A. (London: Longmans, Green & Co.) Pp. viii + 438. 10s.

The Anti-Drug Campaign. By S. H. Bailey. (London: P. S. King & Son.) Pp. xiii + 264. 12s.

The Gold Clause. 2nd ed. By Dr. jur. Arpad Plesch. (London: Stevens & Sons.) Pp. vii + 119. 7s. 6d.

Le Problème des Passports. By Egidio Reale. (Paris: Librairie du Recueil Sirey.) Pp. 104.

Les Nouvelles Tendances du Droit Constitutionnel. By B. Mirkiné Guetziévitch. (Paris: Librairie Générale de Droit et de Jurisprudence.) Pp. x + 218. Frs. 35.

¹ *El Estado de Sitio*, by Dr. Juan Carlos Rébora, pp. 497 and 27 (1935), published by the National University of La Plata.

² Mention here does not preclude a review later.

- Le Pouvoir du Juge International de statuer "ex aequo et bono."* By Max Habicht. (Paris : Librairie du Recueil Sirey.) Pp. 96.
- Statut international de l'U.R.S.S. : Etat Commerçant.* By A. Stoupnitzky. (Paris : Librairie Générale de Droit et de Jurisprudence.) Pp. 468. Frs. 50.
- Adatrechtbundels.* Vol. XXXVIII : *Gago-, Alas- en Bataklanden.* (The Hague : Martinus Nijhoff.) Pp. 511. Gld. 5.
- Das englische Konkursrecht.* By Dr. Felix Eckstein. (Berlin : Walter de Gruyther & Co.) Pp. xv + 351. RM. 10.
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrecht im Jahre 1934.* Ed. by Herbert Müller. (Berlin : Walter de Gruyther & Co.) Pp. 317. RM. 12.

The following periodicals are also received : American Bar Association Journal ; American Journal of International Law ; American Political Science Review ; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque ; Bombay Law Journal ; Bombay Law Reporter ; Bulletin de la Société italienne pour les Etudes de Droit industriel ; Bulletin officiel du Congo Belge ; Bulletin statistique de la République Tchécoslovaque ; Calcutta Weekly Notes ; Canadian Bar Review ; Chinese Social and Political Science Review ; Columbia Law Review ; L'Egypte Contemporaine ; Headway ; Hindustan Review ; International Labour Office Bulletin ; International Labour Review ; International Review of Agricultural Economics ; International Year-Book of Agricultural Legislation ; Journal de Droit International (Clunet) ; Journal of the Parliaments of the Empire ; Juridical Review ; La Giustizia Penale ; La Procedura Penale Italiana ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; New York University Law Quarterly Review ; Revista de Ciencia Juridica y Sociales ; Revista de Derecho jurisprudencia ; Revista de Identificacion y Ciencias penales ; Revue de Droit International et de Législation Comparée ; Revue Internationale de la Croix Rouge ; Social Sciences Quarterly ; South African Law Journal ; Studi di Diritto Industriale ; Tulane Law Review ; University of Illinois Studies in the Social Sciences ; Wisconsin Law Review ; Zeitschrift für Ostrecht.

THE AMERICAN RESTATEMENT OF THE LAW OF CONTRACTS.¹

[Contributed by PROFESSOR P. H. WINFIELD.]

IN our examination of Chapters I-VII of the American *Restatement* published in this *Journal*² we pointed out how necessary an understanding of its nature and aims was to a proper appreciation of the value of the results. It is desirable to emphasize this consideration. Any valuation of the *Restatement* is bound to be wide of the mark unless one constantly bears in mind two things—the purpose which the compilers had in mind and the material upon which they had to work. The two are closely connected, for if the material had not been in such an appalling shape there would have been much less need for the project. The case law of some fifty jurisdictions resulted in a mass of reports and a variety of views that made our own Common Law look compact and ascertainable by comparison. It was to improve this state of things that the American Law Institute decided to get the different topics of the law restated in a concise form which would commend itself to any court as representing a fair common denominator of the rules in the separate jurisdictions. Now it is evident that if the substance of what they have done has this effect the whole aim of the Institute is achieved. Those of us who have a very imperfect acquaintance with American law are quite incapable of saying whether this is likely to happen. So far as the substance of the volume before us goes there is, to the eye of the average alien observer, no reason why it should not, and every one of us earnestly hopes that it will be successful, for almost any conceivable step in this direction is better than the present drifting along with the American Corpus Juris, which, admirable as it is, can do little more than tell an Englishman where the case law is to be found.

Having said that much, any criticisms of the form in which the

¹ *Restatement of the Law of Contracts*, vol. ii. (American Law Institute Publishers, St. Paul, 1932). Pp. xxxi + 583-1206.

² *Journ. Comp. Leg.*, Third Series, vol. ix, pt. iv, pp. 179 ff.

substance of the Restatements is cast are of minor importance. But it must be confessed that this second volume of the Law of Contracts is, like other parts of the *Restatement* which we have reviewed, imperfect in this respect. It is haunted too much by the ghost of the treatises to make it a scientific digest and it is too much of a digest to retain enough of the literary form that the best treatises display. It has little of the sharp conciseness that Sir Fitzjames Stephen would have used in its construction or of the polished style that adorns Sir Frederick Pollock's text-books. To point this criticism we need go no farther than the opening sections of this book which deal with Restitution as one of the judicial remedies for breach of contract. It corresponds to the *restitutio in integrum* of our own law, and the rules relating to it are much the same. The limits of it when the rights of third parties are concerned must be sought not only in s. 354 but also in ss. 488-9 for fraud and misrepresentation. This is reasonable enough, but it would have been more convenient to have direct cross-references in cases like this than to be driven to the index to hunt for the rest of the matter and to find even then that it is inadequate, for it makes no mention of s. 489. There are several other sections (*e.g.* 358, 360) where the heavy type conveys so little that one wonders why it was used.

Passing on, however, from questions of form to those of substance, we note that the *Restatement* of course adopts the rule that a promise to render personal service or supervision will not be specifically enforced by an affirmative decree (s. 379); but it also follows the English authorities that include and succeed *Lumley v. Wagner* (1852).¹ That decision, in which an injunction was issued to prevent an opera singer from performing elsewhere than she had contracted to sing, was thought by Lindley L.J. in a later case² to be an anomaly which it would be very dangerous to extend because it went so near a decree of specific performance. Still later decisions show that there is no objection to decreeing specific performance disguised as an injunction where the contract involves no personal service.³

Chap. 13 is occupied with the various modes of discharging a contract, and some score of them are enumerated in s. 385. Among

¹ 1 De G. M. & G. 604. Used as an example, s. 380.

² *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, 428. *Restatement*, s. 380, sub-s. 2.

³ *E.g. Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. *Restatement*, p. 708.

them are "breach by the other party or failure of consideration or frustration." It is not clear why there is this reference to frustration, for ss. 397-401 which amplify the heading are silent upon it, and frustration itself is included under the different topic of "Impossibility" (s. 454 (b)). Most of the opening sections of Chap. 13 contain elaborate rules on what we should classify as appropriation of payments. A point worth notice in discharge by accord and satisfaction is that "a subsequent contract may itself be accepted as immediate satisfaction" (s. 418). This rule was not clinched in English law until 1933¹ after a long period of doubt during which lip-service was paid to the older doctrine that the accord and satisfaction must be executed, while in fact modern law scouted this historical survival. Of course it is still a matter of interpretation in both systems whether the substituted contract was in fact accepted as taking the place of the earlier obligation (s. 419); but once it has been accepted as such, its performance is irrelevant to the question of discharge. In another part of this topic American law differs from English law. If a creditor accepts any performance tendered by the debtor as satisfaction, his manifest refusal to regard it in this light must be ignored. This cast-iron rule of interpretation compares unfavourably with the view of Lord Esher M.R. that it is a question of fact in each case whether there has been accord and satisfaction. "It is said that that inference of law [*sc.* that there is satisfaction] must be drawn even though the person receiving the cheque never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if this is a conclusive inference it would be one contrary to truth."²

We pass to a much more thorny topic than discharge in Chap. 14, which handles Impossibility. This includes not only impossibility *stricto sensu* but also impracticability owing to extreme and unreasonable difficulty, expense, injury or loss (s. 454); in other words, what we should call frustration. Subjective impossibility (which is no excuse) is neatly distinguished from objective impossibility (which is). "Impossibility may be due to the nature of the thing to be done or to the capacity of the person who has promised to do it. It is the difference between 'the thing cannot be done' and 'I cannot do it.' The first is objective; the second subjective" (p. 845). The *Restatement* would certainly lead to a more sensible

¹ *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616.

² *Day v. McLea*, (1889) 22 Q.B.D. 610, 612.

conclusion than that deducible from the English case of *Thornborrow v. Whitacre*.¹ The defendant, in consideration of 2s. 6d. down and £4 17s. 6d. on performance of his promise, undertook to give the plaintiff two grains of rye on Monday, four on the next Monday and so on—doubling it every Monday—for a year. The defendant, who was ignorant of the law of geometrical progression, found that he must deliver more rye than there was in the world in order to fulfil his bargain and he pleaded impossibility. The action was settled, but Holt C.J. regarded the plea as bad because “it was only impossible with respect to the defendant’s ability.” But on the analysis of impossibility in the *Restatement*, this would certainly be reckoned as objective, not subjective, impossibility. Perhaps, too, s. 456 would protect the defendant: “a promise imposes no duty of performance if the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know,” and even at the present day the ordinary citizen, although he is presumed to know the law, is not presumed to know algebra. For the rest, the rules relating to impossibility are closely similar to our own, but one notable and salutary difference is the right of restitution where impossibility has terminated the contract (s. 468). What has been delivered must be paid for or returned; what has been paid must be repaid; what has been done must be remunerated. With us, if money has been paid it is irrecoverable. The reason given is that “it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude.” This is unconvincing, and indeed the learned judge who put it forward thought the doctrine “to some extent an arbitrary one.”² With us, too, there is no compensation for part performance except when the contract is severable; e.g. where the price of goods is payable by instalments.³

Chap. 15 takes us to Fraud and Misrepresentation. Both American and English law have been occupied a good deal with determining what is a “material” representation. The *Restatement* defines it as one “likely to affect the conduct of a reasonable

¹ (1706) 2 Ld. Raym. 1164.

² Collins M.R. in *Chandler v. Webster*, [1904] 1 K.B. 493, 499.

³ *Appleby v. Myers*, (1867) L.R. 2 C.P. 651. *Anglo-Egyptian Navigation Co. v. Rennie*, (1875) L.R. 10 C.P. 271.

man" (s. 470 (2)).¹ In this connexion a clear and rational statement of the effect of misrepresentation of law appears on p. 903. "A representation of a rule of law unless made by one who is a lawyer to a layman, or by a person who may be supposed to have expert knowledge of the special rule to one who is ignorant of the subject, is inoperative." In English law, the rule is probably the same with respect to innocent misrepresentation. What it is with respect to an action in tort for deceit, no one can say, for we are destitute of authority on the point, but as a matter of general principle and also as a probable inference from the cases on innocent misrepresentation it may be predicted that it is the same as the American rule. Again, there is a welcome clarity in s. 473, "A contractual promise made with the undisclosed intention of not performing it is fraud," and in the comment, "making a promise is a manifestation of an existing intent to perform it. This is an assertion of fact." Our own law is probably the same, but it has been much obscured by the misleading statement in many text-books that mere promises are not statements of fact. S. 471 (a) implies that mere negligence in statement cannot amount to fraud and thus adopts *Derry v. Peek*.² Fraud which annuls any real assent and therefore makes the agreement void and not merely voidable is rightly treated under this topic instead of under Mistake as is usual in most treatises (s. 475). *Cundy v. Lindsay*³ and *Phillips v. Brooks*⁴ are both adopted (p. 908), but the reason for the distinction between them is no better than that accepted in our own authorities. How would the learned authors of the *Restatement* classify swindles of this kind perpetrated over the telephone? Our own opinion, for what it is worth, is that *Phillips v. Brooks* was wrongly decided. Finally we may note that contracts *uberrimæ fidei* will not be found in this context, but under other heads of the projected *Restatement* such as insurance, security and sales.

In Duress and Undue Influence (Chap. 16), it is observable that the former term includes duress of goods (s. 493 (d)). Our own Common Law denies that there is any such thing because a person who is affected thereby was regarded as not possessing the ordinary degree of firmness which the law requires all to exert.⁵ But it is

¹ There is an unnecessary incorporation by reference of s. 474, which is really an illustration of the definition, not an integral part of it.

² (1889) 14 App. Cas. 337.

³ (1878) 3 App. Cas. 459.

⁴ [1919] 2 K.B. 243.

⁵ *Sheate v. Beale*, (1840) 9 L.J. Q.B. 233, 235.

likely that we have reached the American result by different paths. For we can either say that a promise given for the release of goods from unlawful detention is void for want of consideration,¹ or that the equitable doctrine of invalidation of contracts for undue influence passed far beyond the crabbed Common Law doctrine of duress and has now superseded it in this respect.² In any event, money paid for the release of goods can be recovered on quasi-contractual grounds.³

Chap. 17 begins the subject of Mistake by defining it as "a state of mind that is not in accord with the facts" (s. 500), and the Comment adds that this "produces no legal consequences unless some act otherwise capable of legal consequences is done while the state of mind exists" (p. 958). The first notable difference from English law is that mistake where it is operative makes the contract voidable, not void (ss. 502, 503). The second is that the rules as to mutual and unilateral mistake are stated with a breadth and brevity that make them much simpler. It is rightly pointed out (p. 963) that the classification of mistake into categories relating to (a) the nature of the transaction, (b) the identity of the parties, (c) the identity of the thing and (d) collateral matter, are really governed by the same principle; the mistake must be as to something that vitally affects the basis of the contract. That may seem vague, but let anyone read the eighty pages of *Bell v. Lever*,⁴ noting that the final decision was by a majority of three to two, and ask himself whether our law is any better off.

The remaining Chapter treats of Illegal Bargains. Those in restraint of trade are illegal upon much the same conditions as here, but our vague rule that they cannot be lawful if they are against the interests of the public is replaced by something more exact—they must not tend to create a monopoly or to control prices or to limit production artificially or unreasonably restrict the alienation or use of anything that is the subject of property (s. 515 (c), (d)). The definition of a wager⁵ is the most remarkable one that we have ever encountered. We should like to see it expounded to a book-

¹ Anson, *Contract* (17th ed., 1929), pp. 211-12.

² Salmond and Winfield, *Contracts* (1927), p. 258.

³ Winfield, *Province of Tort* (1931), p. 168.

⁴ [1932] A.C. 161.

⁵ S. 520. "A bargain in which a promisor undertakes that, upon the existence or happening of a condition, he will render a performance (a) for which there is no agreed exchange, and (b) which does not indemnify or exonerate the promisee or a beneficiary of the bargain for a loss caused by the existence or happening of the condition is a wager and illegal."

maker on Newmarket Heath. Any average lawyer (including, it is to be hoped, the reviewer) after studying the Comment and following up the cross-reference might still regard the definition as scarcely water-tight and, in any event, wish that something simpler had been substituted for it. The usurer we must pass by on the other side, for the rules that check his iniquities depend on statutes and the same applies to his fellow-sinner, the Sabbath-breaker. Bargains made by the latter, except those of necessity or charity, to be performed wholly or partly on a Sunday are illegal. Another felicitous exception is a promise to marry (s. 538), and the American lover finds himself in company with the English farmer, solicitor, hair-dresser and pastrycook to whom it has been held that our Sunday Observance Act, 1677, does not apply. The sections about Abuse of Legal Procedure (ss. 540-58) are closely akin to our law even to the point of leaving a solicitor in a puzzled condition as to what he may or may not do in the way of speculative litigation. The rest of the Chapter calls for no special remark.

Upon the whole, it is remarkable how nearly the two systems are related. In the law of tort there are more divergencies, but then a contract is more abstracted from considerations of period, place and nationality than is tortious liability.

STUDY OF THE LAW APPLICABLE TO NATIVE CHRISTIANS IN THE FRENCH DEPENDENCIES AND IN INDIA.

[Contributed by M. F. P. HERCHENRODER, Esq., *Docteur en droit* (Paris), *I.C.S. retd.*]

ONE of the problems which confront the French administrator is that of the law which should be applied to native converts to Christianity and their descendants in those territories where native laws and usages still form an important part of the civil law administered to the native community.

These laws and usages are for the most part drawn from religious sources and may indeed be regarded as one of the aspects of religion. The extent to which they have been allowed to remain in force varies in the different dependencies: they may yet regulate such topics as property and even contract, but it is in the sphere of family relations—marriage, divorce, parentage, adoption, guardianship, succession and inheritance—that, out of deference to native sentiment, they have been most widely retained: it is also in that sphere that their retention appears most expedient politically.

It follows that the native's personal laws depend upon his religious profession and that any change of religion by him involves, as its corollary, a corresponding change in these laws. Still, no difficulty is likely to arise—save perhaps in the transition stage—when the creed adopted is one which, like Hinduism, Buddhism or Islam, possesses a determinate legal system to which recognition has been extended by the legislature or the judiciary. It is otherwise when the conversion is to Christianity, for, in the words of the late Sir Roland Wilson, "there is no such thing as Christian law, either in the sense in which we speak of Hindu law or in the sense in which we speak of Jewish or Muslim law."¹ Accordingly, the rules then appropriate to the convert and his descendants are themselves an open question. The Canon law would be a means of resolving the difficulty, if a uniform Canon law were in existence. Opinions

¹ *Digest of Anglo-Muhammādan Law*, 1930, p. 5.

differ as to the general suitability of the Roman Canon law for the purpose, and it is not without significance that when in 1929 it became necessary to define the law which should be administered in the new State of the Vatican City, the choice fell, not upon Canon law, but upon Italian law, the department of marriage being, however, reserved to the former.¹

One might perhaps continue to apply the old law to the convert and his family—a course which the Judicial Committee of the Privy Council had envisaged, prior to the enactment of the Indian Succession Act, 1865, in an Indian appeal which involved questions of succession and inheritance. Their Lordships were of opinion that the convert “might renounce the old law by which he was bound, as he had renounced the old religion, or, if he thought fit, he might abide by the old law, notwithstanding he had renounced the old religion.”² But if such a course is practicable where rights and interests in, and powers over, property are concerned, it can hardly be pursued in matters like marriage and divorce in regard to which the rules of the old law may be out of harmony with the spirit of the new religion. The courts would consequently be driven to adapt the old law to the altered religious circumstances and build up a system of prætorian colonial law, an expedient which unfortunately leaves a wide scope for judicial caprice and divergences of interpretation.

Legislative Measures in British India.—In British India, where the Indian Christian community is the third largest religious body, the problem was tackled, in the years which followed the assumption by the Crown of the government, in a series of legislative measures—the Indian Christian Marriage Acts, 1864 and 1865 (now the Indian Christian Marriage Act, 1872), the Indian Succession Act, 1865 (codified since with other matters in the Indian Succession Act, 1925), the Native Converts’ Marriage Dissolution Act, 1866, the

¹ Vatican Law of June 7, 1929. *Acta Apostolicæ Sedis*, suppl. of June 8, 1929, No. 1.

Editorial Note.—It is to be remarked that the ecclesiastical law of all bodies of Christians even as regards such matters as marriage and divorce is far from identical. Nor would the precepts of the Roman Canon law in these matters meet with acceptance by the several Protestant bodies represented by missionary converts, but having no ecclesiastical law of their own. In the territories formerly part of the Ottoman Empire, e.g. Egypt, Palestine, Cyprus, the older Christian Churches at least are allowed to exercise jurisdiction in matters of personal status over their own members and apply their own Canon law. This is so as regards the Orthodox Church and also the Coptic, Jacobite and Armenian Churches. But such arrangements are traditional and the results not in all respects happy.

² *Abraham v. Abraham*, 1863, Moore’s Indian Appeals, p. 195. This is no longer good law.

Indian Divorce Act, 1869, the Married Women's Property Act, 1874, the Indian Majority Act, 1875, and the Guardians and Wards Act, 1890.

The Native Converts' Marriage Dissolution Act, which legalizes the dissolution of marriages between natives where one of the parties has deserted or repudiated the other owing to the latter's conversion to Christianity, Part VI of the Indian Christian Marriage Act which institutes a cheap and expeditious form of celebration in the case of marriages between native Christians who are not Roman Catholics, as well as a few scattered provisions of minor importance, are obligatory only on the Indian Christian community. The bulk of the legislation, however, extends to all Christians domiciled in British India, whether European or native. Accordingly, while there is, strictly speaking, no code of personal law exclusively applicable to the Indian Christian community, there are definite rules, spread over a number of Statutes, whereby the family relations of members of this community are adequately regulated.

Distinction between Citizens and Subjects.—An eminent French authority¹ regrets that his countrymen have not adopted this method of dealing with the difficulty in their dependencies.

The matter is there complicated by the distinction which the law makes between citizens and subjects, a distinction recalling that which existed in Ancient Rome between *cives* and *peregrini*. While French citizens enjoy full political rights (*e.g.* that of voting at public elections) and are bound by the French civil law, French subjects, on the contrary, are devoid of political rights and are governed by their special religious or customary law.²

On this point French law is in sharp contrast with English law which knows of no such distinction. All persons born within the British dominions are British subjects,³ irrespective of race or parentage, and all British subjects by birth are in the eye of law at all events on one and the same plane.

It is of course possible for a French subject to acquire French citizenship. But if he does so, he is deemed to have renounced his

¹ Professor H. Solus of the Faculty of Law of Paris. Cf. his *Traité de la Condition des Indigènes en Droit Privé*, 1927, p. 154.

² Even after they have acquired a domicile of choice in France herself, they continue to be ruled by this special law. The Paris Court of Appeal has thus held that the estate of a Muhammadan Algerian subject must devolve in conformity with Muslim law, although he had acquired a domicile in France. July 2, 1896. Clunet, *Journal du Droit International Privé*, 1898, p. 1107.

³ Subject to certain exceptions which are not relevant here. Cf. Dicey, *Conflict of Laws*, 1927, p. 158.

religious or customary law and to have subjected himself to French law. The acquisition of citizenship may thus prove a double-edged weapon, for while it confers political rights on the former subject, it deprives the new citizen of the special law which, on religious grounds, he may be reluctant to abandon. This is said partly to account for the failure of the Muhammadans of North Africa to avail themselves in larger numbers of the facilities which the law gives them for the attainment of French citizenship, and in practice it has been found necessary to authorize departures from the rule, *e.g.* in the case of those Senegalese who are French citizens by birth and who, as a special measure, have been permitted to retain Muslim law in matters of "personal status, marriage, succession, gifts and wills."¹

The importance of this characteristic of French public law in relation to native Christians lies in the opportunity which it affords for the acquisition by them of a definite personal status, inasmuch as French law automatically becomes applicable to them on their attainment of citizenship. The conferment of this higher grade of nationality is, however, a matter of grace. To grant or refuse it rests largely with the administrative authorities who, in any case, could not be expected to bestow it indiscriminately on all the members of a particular community. The possibility of acquiring it may mitigate to a certain degree the legal hardship under which native Christians labour, but the relief thus to be obtained is necessarily limited, and, in certain territories, negligible.

Such are the conditions of a problem which is to a large extent still unsolved.

French India.—In French India—where the native Christian community comprises half the total population—the provisions of a decree of September 21, 1881, unique in French colonial legislation, enables all natives, irrespective of creed, to become French citizens merely by renouncing their personal laws. The authorities have no voice in the matter. Converts to Christianity generally avail themselves of this right,² whereupon they become bound, like other French citizens, by French law.

Independently of this, native Christians, even if they are mere subjects, are governed by the French Civil Code in the matter of

¹ Decree of November 20, 1932. On the whole question of the distinction between citizens and subjects and its implications, cf. Vernier de Byans, *Condition Juridique et Politique des Indigènes dans les Possessions Coloniales* (1906); Solus, *op. cit.*; Rolland et Lampué, *Précis de Législation Coloniale* (1931), *passim*.

² Solus, *op. cit.*, p. 155, note (4).

marriage. So provides a decree of April 24, 1880. This regulation of the most important department of family law has considerably eased the situation.

Indo-China.—Farther East, in Indo-China, where the native Christian community numbers 788,500 souls,¹ a distinction must be made between Cochinchina and the other territories which are for the most part protectorates. In Cochinchina, all natives may, under a decree of October 3, 1883, elect to have their marriage state regulated by French law. This provision is permissive, not imperative, so that while it extends to native Christians, it is not obligatory on them, as in the case of the corresponding decree in French India.

Some thirty years ago, the Saigon Court of Appeal was called upon to decide the validity of a marriage which had been solemnized between native Christians by a priest, but without the intervention of the civil power. The secular character (*laïcité*) of the institution of marriage is a cardinal principle of the French Civil Code. By this is meant that the law will ignore any religious ceremony that may have been performed and only recognize solemnization in the presence of the "officer of civil status," whose functions in this connexion correspond to those of the registrar of marriages in England. To this principle an exception is naturally made in favour of those marriages which have been celebrated between natives in the oversea dominions in accordance with their religious laws and usages. The question before the court was whether native Christians could claim the benefit of this exception. The court held that they could do so on the ground that "the laws extending recognition to marriages solemnized according to local usages must as a matter of course apply to all natives, irrespective of their religious profession, from which it followed that Christians, like other natives, could have their marriages celebrated either in the presence of the officer of civil status or according to the rites of their religion."² The court seems thus to have implicitly acknowledged the existence of a Christian customary law entitled to rank among the religious laws and usages accorded recognition.

In other parts of Indo-China—Annam, Tonking, Cambodia, the Laos States—the law applicable to native Christians does not appear to have been the subject of legislative or judicial interpretation.

¹ These figures are taken from *L'Afrique Française*, November, 1935 *Renseignements Coloniaux*, p. 114, which reproduces an address of Professor H. Solus at the Union Coloniale Française on June 5, 1935.

² May 16, 1907, Dareste, *Recueil de Législation, de Doctrine et de Jurisprudence Coloniales*, 1908, I, 292.

The Pacific Possessions.—In the Pacific, the island of Tahiti presents no difficulty. On its cession to France by King Pomaré V in 1880, the French Parliament conferred French nationality on all the former subjects of the King. Whether this meant that they had become French citizens or that they were merely French subjects was a moot point, but the former view has prevailed. Native Christians of the island are, therefore, governed by French law.

The situation is not so satisfactory in the other Pacific possessions, *e.g.* New Caledonia, the natives of which are not citizens. The view taken by the courts there is that native Christians cannot be married before the officer of civil status on the ground that they are not French citizens. The only other possible course appears to be the recognition of marriages solemnized with the rites of the Church to which the parties belong, and this is the line taken so far by the courts.

African Possessions.—If we turn to Africa, we find that polygamy was abolished in the island of Madagascar as far back as 1881. Moreover, Malagash law does not bear the impress of religious origin. The codes which were compiled and promulgated by the local rulers in the course of the nineteenth century were largely based on English law.¹ No difficulty, therefore, is likely to arise on the conversion of a native of the island to Christianity since his old law has no religious character and will not conflict with the principles of his new faith.

On the African Continent, fetishistic customs are to be found side by side with Muslim law and usages having an Islamic origin. Animistic beliefs do not possess the staying power of great religions like Islam and Hinduism and accordingly have not been proof against Christianity. It is therefore among the fetishists of Africa that Christianity may be expected to gain ground rapidly, and the following figures² show the progress already made :

			Total Population.	Native Christians.
French West Africa	..	..	13,500,000	287,000
French Equatorial Africa	..	..	3,000,000	178,000
Togoland	..	..	742,000	67,000
Cameroons	..	..	1,800,000	636,700

In the other dependencies, the problems raised by the absence of a law specifically applicable to native Christians have been robbed of much of their practical importance by

¹ Solus, *op. cit.*, p. 212.

² These figures are taken from the November, 1935 issue of *L'Afrique Française*. Cf. note (1), p. 190.

various circumstances, such as the policy of the "open door" for the attainment of citizenship in French India and the option given to natives of Cochin-China of having their marriage state regulated by French law. In Africa, on the other hand, native converts have been denied even the palliative of a "Christian custom." Attempts, indeed, have been made to set up such a custom but the Court of Appeal of French West Africa has set its face against them. It has declined, for instance, to regard as valid a marriage which had been solemnized between native Christians by a Roman Catholic priest.¹ A great deal of criticism has been levelled at this decision. It is not clear, at first sight, how fetishistic rites could be used for the solemnization of a Christian marriage: the continued application of the old customary law in such a case must inevitably give rise to paradoxes. It is true that the harmful effects of this denial of a Christian custom have been partly attenuated by the provision since made that lists of assessors in the native courts should, as far as possible, be drawn up so as to ensure that litigants are judged by leading members of their own community. Still, this only means unrestricted judicial arbitrament, which cannot be said to be a wholly satisfactory solution.

Reasons for the Need of further Legislation.—From this brief survey of the situation in various French dominions two facts emerge: 1. The sporadic nature of legislation concerning native Christians. 2. The limited scope of such legislation as exists, it being confined for the most part to the topic of marriage.

And yet cogent reasons may be given why legislation should be carried further. For one thing, apostasy is frequently punished in religious or customary law with the loss of all civil rights. The convert from Hinduism becomes an outcaste. He forfeits all his rights and property, and is deprived of his right of inheritance. The apostate from Islam incurs similar disabilities. "The unbeliever has severed the link which bound him to God, and on that account God has severed the hereditary bonds which existed between him and the Moslems."² In British India, the Caste Disabilities Removal Act, 1850, re-enacting an earlier Regulation applicable to Bengal, provides that:

So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any

¹ November 13, 1925. Penant, *Recueil Général de Jurisprudence et de Législation Coloniales*, 1925, I, 101.

² Luciani, *Traité des Successions Musulmanes*, 1890, p. 320.

person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

The French have enacted no similar provision for their dependencies. Nevertheless, the Pondicherry Court of Appeal has held that "deprivation of caste being in law tantamount to civil death, one is justified to-day in declaring that it has ceased to exist."¹ Civil death, *i.e.* the loss of all civil rights as the result of certain judicial sentences, was abolished in France by a law of May 31, 1854, which is considered to embody a principle of public policy, and the court has thus assimilated the loss of rights resulting from excommunication to that incurred through conviction. A different view has been taken by the Cour de Cassation (the French Court of Final Appeal) in regard to the impediment to inheritance which apostasy constitutes in Muslim law. The court has allowed an apostate from Islam to be excluded from inheritance.² The same court, however, has disallowed this exclusion where the apostate was a French citizen on the ground that, as a citizen, he was governed, not by the religious law, but by French law which does not recognize religious beliefs as a bar to succession.³

The lot of the native Christian woman in certain dependencies, particularly in Central Africa, is another argument which may be advanced for legislation. At present, her male relations, who may still be heathens, are entitled to press for the application of their customary law to her, in spite of the fact that the prescriptions of that law may conflict with Christian precepts and ideals. She may thus be compelled to marry a polygamous husband or, if she is a widow, she may be claimed as a chattel by her deceased husband's brother.⁴ Only legislation can safeguard freedom of conscience and religion in such cases. In British India the contracting of a second marriage by the husband in the lifetime of the first wife is a ground for divorce among Christians.⁵

Proposed Solutions.—Meanwhile, three solutions to the problem have been proposed. The first is to extend *en bloc* the provisions of

¹ January 30, 1915, cf. Solus, *op. cit.*, p. 320.

² May 22, 1905. Dareste, *Recueil*, 1905, 3, 180.

³ February 10, 1913. Dareste, 1913, 3, 140.

⁴ Cf. Professor H. Solus's address at the Union Coloniale Française, note (1), p. 190.

⁵ S. 10 of the Indian Divorce Act, under which a wife may petition for divorce on the ground of her husband's "marriage with another woman with adultery."

French law to all native Christians. It is doubtful, however, whether the French Civil Code, as a whole and notwithstanding its great value, is suitable for a primitive people. Some of its provisions are undoubtedly antiquated and in need of revision even in France. That apart, it is not free from complexities. The legislation undertaken in British India no doubt drew its inspiration from English law, but its authors judiciously discarded the obsolete features of that system, and—paradoxical as it may seem—thus marked out the path which law reform at home was to tread later. In this way, the archaic distinction between the devolution of moveables and immoveables, “one prolific source of the intricacy of the system of law of England,” according to Austin, was rejected in the Indian Succession Act, 1865, a step followed sixty years later in the Administration of Estates Act, 1925. The French law would similarly have to be modernized and simplified before it could be applied to native Christians.

The second solution is to acknowledge the existence of a “Christian custom.” Unfortunately, as has been said above, the cleavage among the Christian Churches is bound to introduce an element of uncertainty into the presumed contents of such a custom. For instance, while the principle of monogamous marriages would be accepted on all sides, doubts might be entertained as to their indissolubility.

The third solution is to apply Title V of Book I of the Civil Code, which treats of marriage, to all native Christians throughout the French dependencies, as has already been done in French India. Other topics might be taken up later, and in that way it might be possible to retain so much of the convert’s old law as did not conflict with his new religious profession. Law being moulded by the needs of the people in whose midst it takes shape, certain branches of native law may have great merits and be better suited to the requirements of communities still in an early stage of development than the rules elaborated in Europe after centuries of progress. It is only in the field of family relations and particularly marriage that the new sociological trend indicated by the adoption of Christianity renders impracticable the retention of the old law.

In the long run, the intervention of the legislature seems inevitable.

THE HISTORY OF CANADIAN NATIONALITY.

[Contributed by T. BATY, Esq., D.C.L., LL.D., Barrister-at-Law, Inner Temple, Associate of the Institut de Droit International.]

THE history of Canadian nationality, in its international aspect, is roughly this.

Imperial Act of 1870.—Canada being a colony at this time, and the only possible nationality for its inhabitants being British nationality,¹ an Imperial British Statute was passed, which among other things, enabled the Canadian authorities to grant “naturalization” in Canada to aliens.

Two views were taken of this: (1) that it empowered the Canadian authorities to invest aliens with the peculiar constitutional and civil rights of British subjects, *within the limits of Canada*, e.g. to own British ships in Canadian waters; to vote at elections; to be entitled to resist executive expulsion, etc.; (2) that it empowered them to confer British nationality for all purposes. (This curious view was ultimately adopted by Westlake.)

The former view was established to be correct by the case of *Markwald*—a German who was “naturalized” in a colony (Australia) and subsequently held in England not to be a British subject, but to remain a German, although enjoying the privileges of a British subject in Australia.

Therefore it was clear that “naturalization” in a colony, under the authority of the Imperial Act of 1870, did not confer British nationality, or deprive the alien of his foreign nationality, but merely invested him, within the limits of the colony, with the rights and duties of a British subject.

Such a person would not be protected by the British Government abroad. It was a mere local arrangement of no international validity or effect.

Imperial Act of 1914.—In 1914 a totally new Imperial Act was

¹ The term “a Canadian” was not unknown, but had no legal significance, and varied in meaning. A Canadian born, permanently settled in Canada, could certainly be called “a Canadian” without question. But mere birth, or mere residence in Canada, would hardly have done.

passed (amended in some respects in 1918). Canada was still regarded as a colony, without sovereign or semi-sovereign rights, or any international status. "Canadian nationality" was still a thing unthinkable. The Act, however, went farther than that of 1870, in conferring on the authorities of Canada, should they "adopt" the Act, power to confer *complete* British nationality, good everywhere (except in other self-governing colonies which should not have "adopted" the Act), and as much to be recognized by the Imperial Government and other countries as a naturalization conferred in London.

This Act was, however, very properly not made retrospective. It did not impose on foreigners who had obtained the limited "naturalization" which Canada had theretofore been able to give, within its own borders, the full status of British subjects (involving the loss of their own nationality), which Canada could now give them if they asked for it (of course, there was nothing to hinder them from making such an application).

There were now, therefore, two classes of persons "naturalized" in Canada: (1) the persons who had become British subjects on their application under the adoptive Act of 1914; (2) the persons who had been granted the rights of British subjects (within the limits of Canada) under the Act of 1870, and who (*Markwald's Case*) remained aliens, retaining their original nationality for general purposes.

The difference between these two classes is of course a radical one.

Canadian Act of 1921.—At some unknown subsequent date, possibly the signature of the Treaty of Versailles, 1919, Canada acquired some kind of international status, the exact nature of which was for long uncertain, but which involved as a consequence the possibility of an independent Canadian nationality, whether coincident with, or in substitution for, British nationality. The persons who were considered to possess this new nationality were, in a somewhat incidental fashion, defined (without any specific Imperial authority) in a Canadian Statute of 1921. This recognized the possession of "Canadian" nationality by certain classes of persons, who, it is important to observe, must all, to begin with, be *British subjects*. The primary test, after that fundamental qualification, was birth in Canada. Another test was descent from a Canadian, within narrow limits. Another was membership of one of the classes of persons referred to for conciseness as "having Canadian citizenship" in a certain Canadian Act of 1910.

Canadian Act of 1910.—This Statute of 1910 was not, and did not pretend to be, a Naturalization Act, nor to confer any nationality on anybody, nor to authorize it to be conferred. The term "Canadian citizenship" did not mean citizenship in the sense of international nationality: it resembled rather citizenship in the sense of municipal rights. Nor was it imposed or conferred on anyone by that Act of 1910: it was merely used as a short, convenient term by which to denote certain classes of persons.

The object of the Act was to discourage indiscriminate immigration: and in the course of its drastic provisions, it was desired to accord a specially favourable position to certain classes of persons already closely connected with Canada. It was undesirable to enumerate these classes *seriatim* on every occasion on which the Act referred to them—consequently a short description was invented for them, to be used in this Act regulating immigration, viz. "persons possessing Canadian citizenship." The Statute did not create a new status of "Canadian citizenship," or introduce anything like Canadian nationality under that name: it merely invented, for its own purposes of immigration-control, a new expression. The classes covered by this expression, in so far as they comprised British subjects, were ultimately, eleven years later, recognized as having the new Canadian nationality, by the Act of 1921.

Who composed these classes? Roughly: 1. Persons born in Canada. 2. Persons having a home in Canada. 3. Persons resident in Canada (not necessarily permanently). 4. Persons who return to Canada as a place of permanent abode.

Residence for a mere special or temporary purpose will not suffice: probably not even if it is "a home."

It will be seen at once that this provision casts its net very wide. No country would claim as its subjects all persons permanently "resident" within its borders. Yet mere residence (if for five years, and not for a special or temporary purpose) is included as conferring "Canadian citizenship" for the limited purposes of the Act. The object of the Act was to exclude undesirable aliens, and even undesirable British subjects coming from other British countries—but to admit more freely all persons having a substantial connexion with Canada. This substantial connexion, having no recognized technical name, is expressed for the limited purposes of the Act as "Canadian citizenship." No attempt was then made, or could be made, to define Canadian nationality. For Canada was not then considered, even in Canada, to be an independent or semi-

independent International State. "Citizenship" simply meant "close connexion" such as would naturally entitle a person to be exempted from the stringent provisions of an Exclusion Act.

Definition of "Canadian Nationals."—But when Canada, after the War, did acquire an international status as a sovereign or semi-sovereign State, it followed from the acceptance of this situation, that some persons must be Canadian subjects. What happened, internationally, was a tacit cession by the United Kingdom of sovereignty to the Dominion of Canada. No such cession has ever been made in a fashion sufficient to satisfy the law of England, which requires a grant from the King under the Great Seal, or else an Act of Parliament, neither of which has been passed.¹ But, internationally, Canada has, somehow, become a State, and must have subjects. The usual rule in a case of cession is that the "inhabitants" of the country, not withdrawing, *and not being aliens*, become the subjects of the new State. Who are "inhabitants" is always a troublesome question. It may be doubted whether temporary residence is sufficient, and certainly an intention to reside in the future is not sufficient. Birth in the country is certainly insufficient.

When Germany annexed Alsace, for instance, a Frenchman born in Alsace but living in Marseilles would certainly not necessarily become a German: nor would a French medical man, studying for a few years at Strasburg. The Treaty of Peace, in such cases of cession, usually regulates the subject; but in more than one case (*e.g.* the war of 1859 between Austria and Sardinia) the matter was not so regulated, and gave rise to much dispute.

At any rate, the Canadian Parliament decided to express its own opinion as to who were its subjects, and did so rather indirectly, in a Statute directed to enabling them to divest themselves of that character. The Act began by saying who such "Canadian Nationals" were: there is no doubt that by "nationals" it meant "persons possessing the nationality of Canada."

First and foremost, these must be British subjects.

An alien, although enjoying the privileges conferred by Canadian "naturalization" (granted prior to 1914), is not (*Markwald's Case*) a British subject. Subject to this imperative requirement, the Act availed itself of the convenient definition afforded by the Act of

¹ The so-called Statute of Westminster of 1931, which, however, is ambiguously expressed, cannot be said to amount to a cession or grant of independence. It amounts merely to a temporary resignation of legislative authority on the part of a particular legislature. The crucial thing is independent of that Statute, which might, indeed, be repealed to-morrow by the same authority which enacted it.

1910, which included under the term "having Canadian citizenship" the aforesaid various classes of persons having a close connexion with Canada.

That is, Canada considers her subjects to be persons who are British subjects, and closely connected with Canada by : 1. Birth in Canada. 2. Home in Canada. 3. Prolonged residence in Canada. 4. Being "Persons who return" to Canada as a permanent place of abode.

Now it is obvious that this is again to cast a wide net. It is not so wide a net as that cast for a very special purpose by the Act of 1910, for it does not take in persons who are not British subjects. But it is much too wide as an international measure. No country can be expected to lose its subjects contrary to its will and simply because they spend five years in Canada. An Australian mining engineer who spends five years in Vancouver on a permanent job becomes a "Canadian national" according to the Act of 1921. But Australia will no doubt refuse to consider him as anything but Australian. An Englishman born in Canada in 1900, who came with his parents to England in 1905, was educated there, and has no further connexion with Canada whatever, will certainly not be regarded in the United Kingdom as being a Canadian subject.

Reverting to the Act of 1910, which is comparatively unimportant in itself, but important as affording a standard of close connexion with Canada which is utilized by the Act of 1921 to invest British subjects with the character of Canadian nationality, a few more words may not be out of place.

Criteria of Connexion with Canada.—Two criteria of connexion are laid down : 1. Birth ; 2. Residential connexion.

About birth no more need be said, except that birth within the present local limits of Canada seems to be intended. Birth in British Columbia before that Colony entered the Federation would presumably be "birth in Canada," although the party was not born in any place which was then called "Canada" and in fact may never have been in any place called Canada at all, having left British Columbia before federation.

But the residential connexions are much more difficult. They are not very carefully framed, because the object of the Statute was a limited one. It did not very much matter if a few persons more or less were admitted freely into the country. But the adoption of its definitions by the Act of 1921 as a standard of nationality is a much more serious thing.

The various residential qualifications are classed together as "domicile." This, to begin with, is an abuse of the word "domicile," which has a definite, technical, legal meaning, going far beyond mere prolonged residence on the one hand, and falling far short of it on the other. To use it to denote a variety of miscellaneous qualifications is highly misleading. It was obviously used for convenience; but convenience can be purchased at too high a rate.

These so-called "domicile" qualifications are as follows:

1. *Having a home in Canada.*—This, for anything but the limited and special purpose for which the Act of 1910 was passed, is a most unsatisfactory definition. "Home" is a word which has no legal meaning. It is a vague term, depending on the mentality of those who use it. It might even mean (*sensu Americano*) a house of bricks and mortar or other substantial material! Suppose, again, that a young man, living with his parents in London, takes up an engineering job in Canada, and lives in lodgings up and down the country. Has he a "home" in Canada? or is it in London? Again, can one have two "homes"? and is it sufficient that one of them should be in Canada? or does "the place where he has a home" mean "the place where he has his *only* home"?

2. *Having his residence in Canada.*—"Residence" is a word with a fairly precise meaning, and, so far, is free from objection. But, just as in the case of "home," it is uncertain whether by "the place of his residence" is meant "the only place of residence" or "a place of residence." Again, the "residence" must neither be for a "special" nor a "temporary" purpose: this again creates difficulty. A missionary goes to Canada for a "special" purpose, to preach the gospel: but it may well be a lifelong purpose. The force of the term "special" in addition to "temporary" is difficult to appreciate. Everyone who goes to Canada for a permanent stay does so for some special purpose of his or her own. "Special" cannot mean this: then what does it mean?

3. *Return to Canada.*—"A person who returns to Canada as his permanent abode." This is most difficult to place an intelligible interpretation on. Does it mean: (a) a person who, having once been in Canada, has returned to it with the intention of making it his permanent abode; or (b) a person whose habit it is to return to Canada as his permanent abode?

In either case, the requirement of five years' residence, and the exclusion of "special" and "temporary" residence, seem very difficult to fit into the scheme.

But there are two most important conditions added to these "residential" qualifications and the "citizenship" based upon them.

(1) It takes five years to acquire them. This is expressed in the really rather incoherent formula¹ which enacts that such a so-called "domicile" is not acquired until it has lasted for five years. How one can have a domicile before one has acquired it is not explained: but the meaning is clear, that the "home" or "residence" must have continued for five years before it amounts to a "domicile" for the purpose of the Act. Nothing, it may be added, is said as to the "home" or residence of minors; nor as to the effect of a parents' change of home or residence on the residence of the children. Of course a real domicile in the technical sense of English law can be acquired in five minutes.

(2) The "citizenship" (and by the joint operation of the Act of 1921, the "Canadian nationality" dependent upon it) can be lost.

Absence from Canada for one year, without a declaration before a Canadian official, involves this result. So does absence for five continuous years. Of course the British nationality which is a *sine qua non* of Canadian nationality persists notwithstanding this loss of "Canadian" nationality.

International Effect of Naturalization in Canada.—Finally a few remarks may be hazarded on the international effect of naturalization in Canada.

The former so-called "naturalization" of a foreigner in Canada under the British Act of 1870 and the Canadian Act of 1881 was, as *Markwald's case* has shown, no true international naturalization at all. It was only a process by which there was conferred on him the constitutional rights and the civil qualifications of a British subject *within the limits* of Canada. There could in 1870 (when the Imperial Act enabling such "naturalizations" was passed) be no question of an internationally valid *Canadian* nationality—for Canada then was neither a sovereign nor a semi-sovereign State; but simply a colony. The only question was whether the Act meant to authorize the Canadian legislature and executive to confer full *British* nationality on aliens, or merely to authorize them to allow aliens to enjoy in Canada the privileges of British subjects.

*Markwald's case*² definitely decided (as above noted) that it

¹ Immigration Act, 1910, s. 2 (e (1)). (Canada.)

² 1920 L.R., 1 Ch. p. 348.

meant only the latter. A German "naturalized" in Australia was held not to be a British subject in the United Kingdom. Similarly, a Japanese or an Italian "naturalized" by this process in Canada would not be held in the United Kingdom to be a British subject.

There was of course at these various dates no question of being a "Canadian subject," or an "Australian subject"—for there was no internationally recognized State of Australia nor of Canada.

Has it made any difference to persons "naturalized" in pursuance of the Imperial Act of 1870 and the corresponding Canadian Acts of 1881 to 1906 that: (1) the Imperial Acts of 1914 and 1918 have been passed in the United Kingdom and "adopted" in Canada? (2) Canada has attained a status as an International State which can have subjects of her own?

It would seem, decidedly not: because—(1) the Imperial Acts, which now enable the Canadian officials to grant a general British nationality, good throughout the Empire (with certain exceptions) are not retrospective; and anyhow do not purport to convert a limited "naturalization" already granted under the British Act of 1870 (which leaves the original nationality subsisting, while conferring on the party constitutional and civil rights in Canada), into a *general* British naturalization, depriving him of his original nationality.

(2) The mere fact that Canada has become an International State which can have subjects of her own cannot operate to turn aliens on whom she has conferred constitutional and civil rights by the limited process competent under the Act of 1870 into subjects of Canada, involving the loss of their former nationality.

Indeed, it would be highly unjust to convert the limited and qualified "naturalization," which alone was competent under the Act of 1870, into a new and complete naturalization, involving, against the will of the party, the loss of the original nationality and the acceptance of another, whether British or Canadian.

It may therefore safely be concluded that the old limited "naturalization" has no wider effect than before. The effect of a Canadian naturalization under modern Canadian Statutes (if such exist) is a much more delicate question, and its solution must depend on the view which is taken of the present relation between Canada and the United Kingdom. If, as seems most probable, Canada is in truth and in fact independent, naturalization in Canada should no longer confer the status of a British subject in England under the Imperial Acts of 1914 and 1918. For the state of things contemplated by that Act

no longer exists. It would be absurd to argue that if the Naturalization provisions of 1914 and 1918 had existed in 1778, they would have been applicable to Massachusetts after its independence had been secured, so as to enable Massachusetts to create British subjects! So long, indeed, as the King remains King of Canada, persons naturalized in Canada will remain British subjects in Great Britain in the eyes of English law. But internationally their sole nationality must be Canadian. The personal union of the Crowns has no international significance. Great Britain and Hanover remained internationally separate Kingdoms during the reigns of the Electors in London; although as subjects of their own King the English courts considered them as bound by the duties and entitled to the rights of English people.

INTERNATIONAL LAW AND THE TRANSFER OF MANDATED TERRITORIES.

[Contributed by DR. FRIEDRICH HONIG.]

ALTHOUGH barely two decades have elapsed since the creation of the international "mandate," the lawyers and diplomats of the world have more than once seen themselves confronted with problems of the utmost legal and political delicacy concerning the legal status of mandated territories.¹ In view of the fact that in the near future the legal status of mandated territories will again be a prominent feature in international conferences, it is necessary now to find a firm legal basis for the problems which are then likely to arise.

Many excellent works have been written about mandates and their administration,² but very little has yet been said about the question as to whether (1) mandates are transferable and as to (2) the requirements of such a transfer. The question has, it seems, so far not been extended beyond its political significance.³ An attempt will therefore be made to review the legal aspect of the problem, which task must in the circumstances be undertaken without the aid of precedents.⁴

Capacity to dispose of Mandated Territory.—The capacity to dis-

¹ The following instances may be mentioned :

(a) In 1923 the boundary of Ruanda in East Africa had to be rectified in order to preserve the geographical integrity of that territory which was partly under English and partly under Belgian mandate. L. of N., Council, Min. sess. XXVI, O.J. IV, 1273.

(b) When Japan gave notice that she intended to leave the League of Nations, the League had to consider the question whether, in view of this withdrawal, Japan's Pacific Mandate automatically came to an end. See Evans, "Would Japanese Withdrawal from the League affect the Status of the Japanese Mandate," *American Journal of International Law*, 1933, p. 140.

(c) Iraq, which was held by Britain, as mandatory, became an independent kingdom in 1932. As to this see Blondel, "La cessation des mandats et le cas de l'Irak," *Revue générale de droit international public* 1932, pp. 614 seq.

² These are enumerated in the *List of Works relating to the Mandate System, and the Territories under Mandate*, Allen & Unwin.

³ See Mr. Baldwin's answers to questions in the House of Commons on April 27, 1936, *The Times*, April 28, 1936.

⁴ The rectification of the boundaries of Ruanda, referred to in footnote 1, is not, legally speaking, a transfer of territory. The parties recognized themselves that the part which came under Belgian administration in 1923 ought to have been incorporated in the Belgian mandate from the beginning.

pose of mandated territories depends on the legal powers which international law vests in the mandatory States. Art. 22 of the Covenant of the League of Nations is silent on this point, and the reason for this silence may be sought in the fact that international law when it creates a certain state of affairs does not provide for its cessation. It is otherwise where there is a bilateral treaty which contains the provisions of its own termination. Where, however, there is a rule of law such as the Covenant of the League of Nations binding the majority of the existing States, international law does not endeavour to regulate every hypothetical case that may arise in the future. Consequently these rules of law offer more scope for speculation than bilateral treaties. The truth of this statement has become evident in the recent Italo-Ethiopian conflict. If it is at all possible to state international law in the same degree as intra-national law, then the lawyer must be prepared in order to prevent the law from being overridden by *faits accomplis* which shape a new world without having regard to the rules of law.¹

As regards mandates, various theories have been put forward.

Theory of the English Law of Trusts.—The theory of the English law of trusts seems to be favoured by some lawyers.² Campbell Lee even goes as far as saying that "much of the confusion arises out of its supposed close connexion with continental and Roman law."³ With all due respect to this school of thought, it may be said that the theory of trusts is too insular to be applicable to international law. The law of trusts is not only a term of private law, but it is a term peculiar to English law which is not recognized outside the Anglo-American legal system. The law of trusts is based on the maxim *delegatus non potest delegare*, or, in other words, the obligation which has been imposed upon a trustee must be discharged by him and not by an agent. That this maxim does not apply to the administration of mandates follows from the Nauru Island Agreement Act, 1920,⁴ which was passed with the approval of the League of Nations. The Act lays down in Art. 1 that the administration of the

¹ We have the curious fact now that the lawyers are completely puzzled by the annexation of Abyssinia. Italy, by annexing the territory of a member State of the League, has thereby impliedly altered the Covenant in that she has taken away the legal capacity of that State. Decisions of the League must be taken unanimously, and if not so taken, are of no legal effect. Yet there is, in spite of the obvious illegality of the step taken by Italy, some doubt as to the validity of the "annexation" of Abyssinia.

² Campbell Lee, *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law* (Lecture, 1921). Campbell Lee, *Mandates, how they are Working*, 1927, p. 4. Norman Bentwich, *The Mandates System*, 1930, p. 7. Van Rees, "Certains aspects du régime des mandats internationaux," vol. 9, *Bibliotheca Visseriana*, p. 5.

Although it is true that Art. 22 of the Covenant speaks of a "sacred trust" of civilization, it may be said that this is a statement of "ethical" rather than legal principles. Bentwich, *op. cit.*, p. 3.

³ Campbell Lee, Lecture, p. 7.

⁴ 10 & 11 Geo. 5, ch. 27.

Island of Nauru shall be vested in an administrator. The mandate itself had been conferred upon the British Empire.¹ That shows beyond doubt that the law of trusts is not applicable to the international mandate.²

Theory of Roman Law.—The law of mandate or guardianship, according to the conception of Roman law, is inapplicable for the same reason. That the analogy is rather vague is admitted by those even who endeavour to apply the rules of Roman law.³ And, in fact, these writers are unable to determine on these grounds the question whether a mandate is transferable or not.

If we accepted the analogy in private law, we would get the curious result that, if a transfer were contemplated, the mandatory would have to hand back the mandate to the League and the League would have to administer the mandate until a new mandatory could be found. This, however, is a legal impossibility, because the League has no such power of administration.⁴

Need for New Legal Basis.—For these reasons it is desirable and necessary to find a new legal basis for the international mandate. Generally speaking, it may be said that no useful purpose can be served by introducing terms of private law into the system of international law. The system is independent of private law and it has to serve different purposes. The development of international law necessitates new principles for which private law is unable to find a basis.⁵ This is true of international law as it existed before the war, and there is no reason

¹ This example, however, affords in no way a precedent for the transfer of mandated territories in that the responsibility remained vested in the British Empire. The mandatory remains the same, but his duty is discharged by an administrator (Australia): Fauchille, *Traité de droit international public*, tome Ier, 2ème partie, p. 886: "le commonwealth australien exerce en fait l'administration de l'île de Nauru comme une sorte de gérant ou de sous-mandataire de l'empire Britannique, que ce dernier n'en est pas moins responsable à l'égard de la Société des Nations. . . ."

² Oppenheim, *International Law*, 4th ed., 1928, vol. i, p. 202, says that it is doubtful whether much practical help can be derived from the analogy in private law.

³ See Goudy, "On Mandatory Government in the Law of Nations," *Journ. Comp. Leg.*, 3rd Series, vol. 1, pt. iii, p. 182. Here an attempt is made to determine the questions relating to mandates by applying Roman law and the French civil code.

⁴ The desirability of such an administration by the League itself is in no way contested, but in law no such power exists. As to the question whether such a transfer is desirable, see a series of articles on "League and Mandates" in the *Manchester Guardian* of May 5, 1936, and the following days.

⁵ The following example may serve to illustrate this view: If we are to accept rules of private law as being applicable to international law, then we must recognize undue influence, mistake and all the other factors which invalidate contractual agreements. We would then have to go as far as saying that a peace treaty which—as is nearly always the case—is signed under duress is voidable. This shows clearly that we must ban terms of private law from the interpretation of international law, unless they are absolutely necessary.

to suppose that it is not true of post-war law. The mandatory system is a creation of post-war agreements, and the only source of interpretation are the Covenant of the League of Nations, in particular Art. 22, and the various mandates which have been drawn up in later years.¹

Conditions and Rules of Procedure in the Case of Transfer.—As has been said above, these documents do not contain any reference to the transfer of mandated territories. This fact, however, does not mean that transfer is not possible,² but it simply shows that transfer was not contemplated by the signatories of the Covenant at the time when it was drawn up. There is therefore no reason to suppose that transfer cannot be effected under certain conditions. What these conditions are and what rules of procedure have to be observed in the case of a transfer being contemplated, are shown in the sequel.

It is necessary to emphasize again that there is no precedent in this direction, as neither the rectification of the boundary of Ruanda nor the transfer of the administration of Nauru to the Dominion of Australia represents in law a transfer of territory.

No Transfer to a Non-Member of the League.—It is a matter of course that in the first place there must be an agreement between the assignor and the assignee mandatory. The assignee must, according to Art. 22 of the Covenant, be an "advanced nation"³ which, in all probability, will be able to govern a native population.

It is a matter of doubt whether the prospective mandatory must be a member of the League or whether it is sufficient that he is an "advanced nation" outside the League. The question was widely discussed when Japan gave notice that she intended to leave the League of Nations. The problem has now been solved in Japan's favour⁴ in that she did not surrender her Pacific Mandate after she had ceased to be a member of the League of Nations.⁵

The majority of lawyers, particularly of Japanese lawyers such as Ujiro Oyama, Yoshiichi Taoka and Sakutaro Tachi, were of opinion that

¹ For a good collection see Amedeo Giannini, *I mandati internazionali*, 1933.

² This follows from the general rule of law that that which is not expressly forbidden by law is allowed.

³ The term is a very wide one, but it seems to imply that the prospective mandatory must be a nation the government of which is based on equality of rights among its inhabitants. Although the mandatory need not necessarily be a democratic country, the rule of law must be an established principle and, moreover, there must not be any racial discrimination, in view of the fact that the majority of the mandated territories have a native population.

⁴ It will be seen, however, that the case of Japan is different from that which is discussed here.

⁵ This is another instance of how the political status can be changed by *faits accomplis* and acquiescence. As to the *interpretation* of international law and its acceptance as new law, see Wright, *Mandates under the League of Nations*, 1930, p. 436.

the withdrawal from the League of Nations could in no way affect the continuance of the mandate.¹

Even if we accept—as we must, by the force of circumstances—the proposition that withdrawal from the League does not terminate the powers of a mandatory, we need not go beyond that. On the contrary, it may rightly be assumed that the new mandatory in the case of a transfer of mandated territories must be a member of the League.² This case is different from that in which the power remains vested in a mandatory who was a member and who has now ceased to have that qualification.

There are various reasons for the assumption that the prospective mandatory must be a member of the League. The mandates were originally conferred upon the mandatories by the Allied and Associated Powers before the League as such had come into existence. The idea was that only those States which were under the control of a universal assembly of the nations of the world should be entrusted with the administration of mandated territories. The Associated Powers having ceased to exist as a separate legal body, their powers are now vested in the League, and the *ratio legis*, that is the universal character of an assembly of the nations of the world, is now the same as it was when mandates were first conferred upon mandatory powers.

It is highly controversial whether the League can exercise any powers over non-member States. But even if the League had certain powers of coercion, it certainly has no powers of control such as are necessary for the proper administration of mandates. Why, then, should the League divest itself of all powers of control from the outset by conferring a mandate upon a non-member? There is no reason why the League should thus weaken its own powers.

We can, therefore, not accept the view that a mandate can be transferred to a non-member of the League.³

Legal Status of the Mandated Territory.—The next condition which must be attached to the transfer of a mandate is one which concerns the legal status of the territory itself. The status of the mandate must at

¹ See also Evans, "Would Japanese Withdrawal from the League affect the Status of the Japanese Mandate," *American Journal of International Law*, 1933, p. 140. Wright, *op. cit.*, p. 439. Fauchille, *op. cit.*, p. 884. The argument that also a non-member of the League can be a mandatory, because Art. 22 merely speaks of "advanced nations" without mentioning any membership qualification (see Wright, *op. cit.*, p. 439), is a very weak one. Art. 22 is in this respect a kind of preamble rather than a rule of law: Bentwich, *op. cit.*, p. 3.

² The fact alone that a mandate over Armenia was offered to a non-member, viz. the United States of America, does not prove anything to the contrary. The League Council, in making the offer to the United States, did not create new law. The mandate has, in fact, never been accepted by the United States.

³ Even the case of Japan's Pacific Mandate is a political rather than a legal solution of the problem. This case created a state of affairs, but it did not create new law. Even if it had done so, it would not have furnished a precedent for the case of transfer. There are certain imponderabilia in international law creating situations with which the members of the League of necessity are unable to deal without resort to war.

least be maintained. The transfer must not render the legal position of the transferred territory inferior to that which it hitherto enjoyed. This may be illustrated by the following example: No mandated territory can be made a colony of the transferee State, nor can an A mandate be degraded to the status of a B mandate. This follows from Art. 22 of the Covenant, which provides that an A mandate shall be administered so long as it is unable to stand alone. As regards B and C mandates, Art. 22 implies that they shall in due course become A mandates and shall then, when able to stand alone, acquire the status of independence.¹ It would be possible, however, to raise the legal status of a transferred territory to that which corresponds to a self-governing Dominion within the British Empire. This would help to further the ends laid down in Art. 22 with regard to the development of mandated territories and could therefore not be objected to on legal grounds.

Right of Self-determination.—It seems to be a matter of some doubt whether the populations under mandate have a right of self-determination.² The assumption, however, that they have such a right appears to be dictated by sentimental rather than legal considerations. In law there is no provision for a plebiscite to be held in the mandated territory before transfer can take place. Art. 22, subsection 4, might perhaps be responsible for a misinterpretation in that it says: "The wishes of these communities (A mandates) must be a principal consideration in the selection of the mandatory." But this provision is no more than a moral obligation put upon the League before it can distribute mandates at all, to the effect that the vital necessities of the populations shall not be disregarded. There are, however, still stronger reasons to support the view that a plebiscite in the mandated territory³ would be outside the law. It is left to the discretion of the mandatory power and the League when a mandate shall terminate. The population of the territory has no right of determination in this respect. The same must apply to a transfer, because, in this respect, it is nothing more than a continuation of the mandate which cannot be put an end to by the population under mandate. Furthermore, where a plebiscite is requisite it is expressly provided for in treaties. Where these are silent in this respect no such right can exist.

Consent of the League Council.—Lastly, we have to determine the question whether the consent of the Council of the League of Nations is necessary to give effect to the transfer of a mandate. The answer which must be in the affirmative⁴ follows, by implication, from the terms of

¹ As to this see Fauchille, *op. cit.*, p. 883.

² Campbell Lee, *Mandates: How they are Working*, 1927, is of opinion that they have. The other writers are silent on this point.

³ As regards B and C mandates there cannot be any doubt at all, because Art. 22, subsection 4, concerns A mandates only.

⁴ It is, however, wrong to suppose that precedents exist in this direction (this is the opinion of Oppenheim, *op. cit.*, p. 204). The rectification of the boundary of Ruanda, as has already been said above, was not, legally speaking, a transfer of territory.

the various mandates. Every mandate contains a provision that the consent of the Council of the League of Nations is required for any modification of its terms.¹ There can be no doubt that the substitution of one mandatory by another is a modification of the mandate.

The consent of the Council must be unanimous. This applies even to a case in which the transfer is proposed by the transferor mandatory, and a majority will not suffice in this nor in any other case.²

Position of the United States of America.—The United States of America are in a doubtful position as regards the transfer of mandated territories. On the one hand, they are one of the Principal Allied and Associated Powers, and on the other hand, they have not acquired membership of the League. In order to safeguard certain rights in mandated territories, the United States have therefore concluded separate treaties with the mandatories.³ In these treaties the United States have reserved to themselves the right that "nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate, . . . unless such modification shall have been assented to by the United States."⁴ From this it follows that in the case of a transfer none of the rights acquired by the United States can be disregarded unless the United States give their assent. The proposition of law, however, does not extend beyond that. The consent of the United States is not necessary to give legal effect to the transfer of mandates.⁵ All the United States can do is to enforce the rights they have reserved to themselves against the transferee mandatory. The duties imposed upon the transferor by the separate agreement concluded with the United States devolve on the transferee and are binding upon him in the same degree as they were binding upon the transferor.⁶ There is, therefore, from the practical point of view, no necessity for the consent of the United States. The confirmation of this fact is found by looking at it from the legal point of view. The idea underlying the requirement of consent by

¹ See, e.g., Mandate for Palestine and Transjordan, Art. 27; Mandate for Syria and the Lebanon, Art. 18; British Mandate for East Africa, Art. 12.

² Berriedale Keith, "Mandates," *Journ. Com. Leg.*, 1922, p. 80, seems to be of opinion that a majority will suffice, in the case of A and B mandates, where the modification of the mandate is proposed by the mandatory.

³ See, e.g., the treaty of February 11, 1922, between the United States and Japan with regard to the Pacific Mandate held by Japan (*American Journal of International Law*, suppl. vol. xvi, pp. 94 seq.); treaty between the United States and France with regard to the French Mandate over Syria and the Lebanon (suppl. vol. xix, pp. 1 seq.).

⁴ E.g. the treaties referred to in footnote above Art. 11, subsection 5, and Art. 6 respectively.

⁵ This applies notwithstanding the fact that the United States might politically be adversely affected by a transfer of mandates. The transfer of mandates might, e.g., be a pretext for the transferee mandatory to strengthen his navy. These considerations, however, do not suffice in law to accord to the United States a position equal to that of a member State of the League.

⁶ The right to hold a mandate creates a status and is not merely a right of possession.

the Council of the League is to safeguard the rights of the mandated territory and not those of any particular power. The idea which underlies the requirement of the consent of the United States in certain cases is, on the other hand, to safeguard the rights of the United States. There is no connexion between the two cases, so that in the case of transfer the consent of the United States may be dispensed with.

Conclusion.—To sum up, we may say that there is in law no bar to the transfer of mandated territories. The transfer, however, can only be effected under the following conditions : (1) There must be an agreement between transferor and transferee. (2) There must be unanimous consent by the Council of the League of Nations. The consent of the United States of America is not necessary, nor need a plebiscite be held among the population of the mandated territory. (3) The transferee must be a member of the League. (4) The legal status of the transferred territory cannot be lowered. It must either be preserved or improved.

JURISPRUDENCE IN THE CRIMINAL LAW.

[Contributed by PROFESSOR G. L. RADBRUCH.]

"IN perhaps no branch of the law has so little work of scientific value been done as in that dealing with crime and criminals."¹ Such is the judgment of an English jurist upon the Criminal Law of his own country as compared with other branches of the law. Nor possibly will the judgment of any Continental jurist be more favourable when he compares the theory of the English Criminal Law with that of his own country. Very different, however, must the conclusion be if the practice of the Criminal Law be taken as the basis of the comparison. In a valuable comparative study of English and Italian Criminal Law recently contributed by Dr. Stallybrass to this *Journal*² we read that "England's glory is that, thanks to the integrity and ability of her judges, the high standard of honour and public spirit of her bar, the practical common sense of her citizens, who serve upon her juries, and the efficiency of her police, there is no country in the world where an innocent man is less likely to be convicted or a guilty man is less likely to escape punishment for his crime. The genius of the Italian is for theory; the genius of the Englishman is for practical administration."³ And Dr. Stallybrass concludes his study with a quotation from Pope much favoured among Englishmen: "Whate'er is best administered, is best."

English and Continental Penal Theory compared.—It is, consequently, not allowable to compare English with Continental Criminal Law without reference to the course of criminal proceedings in England. The English Criminal Law has been far more influenced by its judicial administration than has that of the Continent in which the strict separation of questions of substantive law from those of procedure, and in particular the question of guilt from that of its proof, has become, one might say, almost an article of faith. Circumstances in which the English Criminal Law seems to the Continental jurist to be behind the times are to be attributed as a rule to the peculiar features of the English criminal proceedings, to the utilization of the jury, to the Law of Evidence or to the system of "judge-made law." Law which is to be applied by a jury must consciously

¹ 51 L.Q.R. at p. 709.

² "A comparison of the general principles of Criminal Law in England with the 'Progetto definitivo di un nuovo Codice Penale' of Alfredo Rocco," *Journ. Comp. Leg.*, Third Series, vol. xiii, pt. iv, pp. 203 ff.; vol. xiv, pt. i, pp. 45 ff.; pt. iv, pp. 233 ff.; vol. xv, pt. i, pp. 77 ff.; pt. iv, pp. 332 ff.

³ *Journ. Comp. Leg.*, Third Series, vol. xiii, pt. i, at p. 203.

abandon certain refinements which a lay judge would be certain to find it difficult to grasp. The Law of Evidence makes necessary stronger emphasis upon the external aspect of the crime in comparison with the mental processes of the doer which led up to it, which are far more difficult to establish by the methods of proof allowed. The system of precedents also involves a risk that by a legally binding decision the progressive development of legal thought will find itself cut short as regards some subject or another. Thus it happens that the contemporary English Criminal Law seems to Continental jurists frequently to have stopped short at a point long since passed in Continental legal history.

This last point is worth some further attention. The majority of legal questions are such as may well be envisaged differently according to the varying conceptions of national or social life and which can only be settled by a decision declared to one effect or another. In such cases there must in the interests of the stability of the law be a binding declaration either by the legislator, as would be the case on the Continent, or by the judge, as would be the case in the Anglo-Saxon world. But there are other legal questions which are susceptible of a single solution, capable of progressive explication with the advance of legal science. In these cases a legally binding decision by legislator or judge is only a bar to further progress. The Continental legislator is accustomed in such cases to abandon any attempt to lay down a rule and "die Frage der Wissenschaft zu überlassen." In corresponding cases the Precedent system is doubly bound to have in readiness means to overrule an obsolete precedent. The stability of the law is not imperilled in either event, since the issue concerns a question as to which a single established scientific decision is possible and practicable.

Positivism or Jurisprudence.—It is not less difficult to determine which conceptions of the Criminal Law are apt for a single solution and which demand a positive declaration. In view of the lack of positive rules the older German science of the Criminal Law was compelled to develop its General Part deductively on the basis of general considerations as to the ultimate purposes of the Criminal Law. Anselm Feuerbach (1775–1833), who re-created German penal science, termed the General Part of the Criminal Law the "philosophical part." English penal science was from of old of a far more positive character. This might well be the case since it was able to appeal to binding precedents for the decision of countless special cases. But a development of conceptions of Penal Law independent of positive legal pronouncements was not entirely lacking. "Jurisprudence," *i.e.* the study of general legal ideas, has long since undertaken the task of presenting the principles of criminal liability as inferences from a rule of right reason. Bentham, in his *Principles of Morals and Legislation*, was a pioneer of this way of thinking. This book, first published in 1789, attained in its psychological analysis of penal conceptions a degree of refinement which left far behind the Continental criminal science of the time. Austin's amplification of the same thesis

is in essence founded on Bentham. In his sketch of the General Part of a Criminal Code he has epitomized his conclusions.¹ Clark's *Analysis of Criminal Liability*, 1880, again stands in close relation to Austin's work, while the important book of Stroud on *Mens Rea* (1914) may truthfully be said to apply the methods of Jurisprudence though his results more than those of his predecessors are founded inductively on Case Law. Clark on the other hand is characterized by the use of a method peculiar to himself; he makes a comparison of the penal conceptions worked out by him with their "mathematical congeners."² In this, indeed, he does not treat either of these as based on an *a priori* foundation, but regards them as being proved to be "necessary in actual experience." Though it is not certain whether Clark is right in pronouncing against the *a priori* foundation of both these conceptions, yet what is important for us in the present connexion is that he considers his penal principles as demonstrable in the same way as are mathematical truths.

These views, however, are strongly opposed to those of the leading English criminal lawyer of his time, Sir James Fitzjames Stephen. Stephen was at once Benthamite and Austinian.³ His interest in reforms and efforts in that direction exhibit his Benthamite leanings. His relentless positivism attracted him to Austin. "Respect for hard fact: contempt for the mystical and dreamy; resolute defiance of the *a priori* school who propose to overrule experience by calling their prejudices intuition": such are the phrases in which his attitude is defined by his brother.⁴ Austinian positivism made him a persistent opponent of the views of Clark, though these, nevertheless, had their immediate origin in Austin. To Stephen, they seemed merely a kind of a *priorism*. He does not indeed mention Clark by name, but assuredly had him in view when, not long after the appearance of his book, he remarked: "General theories as to what ought to be the conditions of criminal responsibility may not be useless, but they must depend on the tastes of those who form them and they cannot, so far as I can see, be said in any distinct sense to be either true or false."⁵ The same note is sounded, though less violently, in a review of Stroud's book on *Mens Rea* by Stephen's most significant literary successor.⁶

Which are we to follow: the positivists in penal law or the champions of analytical jurisprudence? German efforts after a "philosophical" General Part have left us with a multitude of disputed questions, which are just as little likely to be so settled by scientific methods as is the conflict between the different theories as to the ends of punishment upon which they depend. It has come to be accepted that some disputed

¹ *Lectures on Jurisprudence*, 3rd ed., p. 1086.

² *Op. cit.*, pp. 109 ff.

³ See his admirable review of the works of Austin and Maine in *Edinburgh Review*, Oct. 1861.

⁴ *Life of Sir James Fitzjames Stephen*, by Leslie Stephen (1895), at p. 309.

⁵ *Hist. Crim. Law* (1883), vol. ii, at p. 96.

⁶ Kenny in *L.Q.R.*, vol. xxxi, at p. 451.

questions, such, for instance, as that concerning the culpability of the impossible attempt and the differentiation of the forms of participation, can find a single solution only by the will of the legislator. In other departments, however, German penal science has, by progressive steps and notwithstanding the silence of the written law, arrived at a generally accepted understanding. Thus in essentials there is agreement as to what constitutes an act and what an omission, as to what is the connotation of intention (*Absicht*), malice (*Vorsatz*), knowledge (*Wissentlichkeit*) and of conscious rashness and unconscious "negligence" (*bewusste oder unbewusste Fahrlässigkeit*).¹ It is noteworthy that English jurisprudence quite independently of German penal science has reached surprisingly similar results. It is for the German criminalist an intellectual pleasure of a rare kind to recognize indubitably in the definite conceptions of Bentham, Austin and Clark, though under other names, the identical ideas which have been reached by their own labours. This harmony may indeed be taken as proof that at any rate the conceptions of Act and Fault (*Schuld*) are attainable by scientific cognition without need of a positive legal pronouncement. It is, however, more difficult to explain this fact if at least "natural law" explanations are rejected. Perhaps the explanation is to be found in the circumstance that the conceptions of Act and Fault are not dependent upon the conflict of opinions as to the purpose of punishment, because they are conformably required in like manner whatever view of the purpose of punishment be adopted. "Precisely the same knowledge on his (the criminal's) part is required to account for any rational exercise of (such) vengeance, which we shall see to be required in order that punishment may effect its other, the deterrent or preventing end."² This explanation may be correct or not, the fact of a unified understanding of definite penal conceptions remains in any case indisputable. In Anglo-Saxon penal science a movement towards the deepening of the study of the problem of the *Mens Rea* is already beginning. "The time has surely come when we need to clarify our thinking on the fundamental problems of volition and motive and the relevance of fault and liability."³

In yet another field of penal study has science brought about a unified understanding. The main effort of German penal science in the last decade has been directed to secure the foundation of a clarified system of Criminal Law, and in this it has achieved far-reaching agreement. English jurists, in particular Clark and Stroud, have also turned their attention to these questions; they have carefully distinguished the several hypotheses of criminal liability and separated out numerous exemptions from responsibility which according to the traditional presentations are

¹ [The English translation of these German terms can only be approximate in meaning. See, more fully, "Mens Rea in German and English Criminal Law," *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. i, pp. 78 ff.—EDITOR.]

² Clark, *op. cit.*, pp. 5 ff. See also Kantorowicz, *Tat und Schuld* (1933), p. 5.

³ R. C. Auld, *Toronto Law Review* I (1930), vol. i, at p. 219.

usually treated under one head, among the several hypotheses from which they are exceptions. English penal science has hitherto bestowed little attention upon their efforts. But the above-cited articles of Dr. Stallybrass indicate already how much English Criminal Law may profit by its presentation in accordance with the categories of a Continental system.

The Offence in English Penal Science.—In English penal science the idea of the offence is usually expounded with reference to the maxim *actus non facit reum, nisi mens sit rea*. The exposition proceeds along two lines: *actus*, as the objective act or omission which forms the nucleus of the offence, and *mens rea*, the subjective fault. As the *mens rea* is normally deemed to be present, its absence must be established by the accused: it is in general not so well shown in what hypotheses *mens rea* is present as in what hypotheses it is absent. It is usual to describe these as “excuses” and to enumerate them under the heading “Exemptions from responsibility.” As such we find treated not only cases in which *mens rea* is excluded, like infancy, insanity, threats, mistake, but, mixed up rather casually with these are cases in which the act is not merely excusable but justified, like the case of necessity. “It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be *justified* in breaking it.”¹ Moreover, the cases of exemption are not exhausted in this section of the General Part. In particular a further series turns up in the discussion of homicide. In this connexion they are divided into justifications and excuses. As excuses are mentioned “chance medley” and “misadventure” and, in Foster’s words, it is usual to emphasize the fact that excusable homicides are not innocent but culpable and are only excusable “through the benignity of the law.” This may also be true in the case of “chance medley” if, for example, one who in a “sudden combat” kills his opponent in self-defence was, in common with him, responsible for the struggle.² But it is, surely, not true in the case of misadventure, which, like the excuses treated in the General Part, involves complete freedom from culpability. Misadventure is indeed strictly to be taken as a special case of ignorance or mistake: in these latter instances indeed, our thought rests primarily on error as to the accompanying circumstances, but they also include cases in which the error is one as to the consequences and, when the lack of foresight as to the consequences is excusable, there is misadventure.³ However this

¹ Stephen, *Hist. Crim. Law* II, at p. 109.

² But Dr. Stallybrass (*loc. cit.*, vol. xiv, at p. 242) remarks with justice that in the case of sudden quarrels “the excuse on the ground of provocation becomes almost inextricably confused with the defence of self-defence” (a case of justification). Francis Bacon, in his *Maxims of the Common Law* (Regula V) indeed considers not even *seipsum defendendo* as a matter of justification, “because quarrels are not presumed to grow without some wrongs either in words or deeds on either part, and the law . . . supposes the party that kills another in his own defence not to be without malice.”

³ So also Dr. Stallybrass (*loc. cit.*, vol. xiii, p. 214.) “Such cases seem properly to rest upon the absence of a *mens rea* rather than of an *actus reus*.”

may be, the excuses in the case of homicide are related like the exemptions in the General Part to the question of *mens rea* which in the case of the exemptions is entirely absent and in the case of these excuses is present in so minor a degree that it may pass unnoticed. The cases in which guilty mind is quite absent or nearly so must on the other hand be contrasted with those of justifiable homicide, such as execution of the law, self-defence, consent, as belonging to an entirely different category. The contrast becomes confused if as the fundamental difference between the two we emphasize the circumstance that in the case of excuses "the very name imports some fault" while in the case of justifications "no kind of fault, not even in the minutest degree," is present (Blackstone). This emphasis upon a secondary distinction gives rise to the error that it is the same mark of delinquency which in the case of justifications is wholly and in the case of excuses is in part lacking. In truth, however, it is quite another mark which is lacking in justification from that which is present in a minor degree as regards excuses. Clark characterizes them justly in opposing circumstances of an external character the presence of which makes the act "not criminal at all," to those which exclude or diminish fault and which relate to the consciousness of the doer.¹ Yet more significantly Stroud says of the justifications: "that which at other times or on other occasions would be wrong and criminal, is, subject to definite restrictions, made right and lawful."² Besides the *actus* and the *mens rea* there exists a third mark of delinquency excluded where justification is present, namely illegality. Stroud as well as Clark, consequently, disassociate justifications from the peculiar connexion with killing and find place for them in the General Part.³ But this does not enable them to free themselves entirely from the existing confusion. Clark puts excuses also in the new class to which he consigns justifications; Stroud even calls justifications "occasional excuses" and classes them systematically in the same category with the four real excuses which are grounds for excluding or reducing fault. Once again we are back in the confusion of ideas which in a very famous judgment is brought out with epigrammatic distinctness: "unless the killing can be *justified* by some well-recognized *excuse* admitted by law."⁴

Distinction between Justification and Excuse.—A sharp distinction between justifications and excuses has not been attained for the obvious reason that no great importance has been attached to it. In earlier times the excusable homicide was distinguished from the justified homicide by the exceptional legal results which followed, namely forfeiture and deodand. Forfeiture was abolished in 1828 and deodand in 1846. Since

¹ *Op. cit.*, p. 14.

² *Op. cit.*, p. 282. So also Mr. Perkins in *Yale Law Journal*, vol. xliii (1934), p. 541, note 39, demands clear distinction between justifications and excuses.

³ So also Dr. Stallybrass, *loc. cit.*, vol. xiv, pp. 233 ff.

⁴ *R. v. Dudley and Stephens*, L.R. 14 Q.B.D. 273 (*The Mignonette Case*). See also *R. v. Prince*, 2 C.C.R. 154 per Denman J.: "such an *excuse* as being proved would be a complete *justification* for the act,"

excusable homicide thus came to be as completely exempt from punishment as justifiable homicide it seemed that "the importance of the distinction has now disappeared" and that "the homicides which down to that time had been classed as excusable ceased, thenceforward, to differ at all in their legal consequences from such as were fully justified."¹ But this supposition is not correct; in at least four relations justifiable and excusable acts have different legal consequences. In all four cases the acts in which the element of fault is reduced to the extent of exemption from punishment, on the one hand, balance those from which, on the other hand, fault is excluded. Only in the case of the antiquated excuse of "chance medley" does it remain doubtful whether it should be classified with the other excusable offences or with the closely related justification of "self-defence." The following are the four differences between justifications and excuses:

1. In the first place, there is no right of self-defence against a justifiable act. Thus no right of self-defence exists as against an act done in defence of oneself. On the other hand if the act is merely excused and in consequence the fault is only excluded or reduced but the act remains illegal, a right of self-defence against the act does exist, *e.g.* against the act of an insane person.

2. Further, ignorance and mistake indubitably exclude intention if they relate to a circumstance of a justifying character, but not if they relate to one which would merely exclude or reduce fault. A person who erroneously believes himself to be attacked and consequently entitled to defend himself acts without intention and, provided that his mistake is not due to inadvertence, without fault. But if a person committing a later act believes himself to be insane in consequence of an earlier acquittal on that ground, or if, in consequence of a mistake as to the day of his birth, he believes himself to be under the age of criminal responsibility, he cannot make use of the defence of mistake.²

3. The principal in the second degree and the accessory before the fact is not liable to punishment if the principal's act was justifiable, but is punishable irrespective of the fact that the principal has an excuse. The participator in the self-defence of another is himself justified, but the participator in the crime of an insane person is liable to punishment as

¹ Kenny, *Outlines* (13th ed. 1929), pp. 104, 107.

² Stephen J. in *R. v. Tolson*, 23 Q.B.D. 168, referring to the well-known opinions of the judges in *McNaghten's Case*: "It is stated that if, under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused." He adds: "This could hardly be if the same were not law as to a sane mistake." Both statements are in two respects inaccurate: (1) the erroneous apprehension of an excusing fact is never an excuse; (2) the mistaken apprehension of a justifying fact is always an excuse, never a justification. In the rules laid down by the judges in *McNaghten's Case* (10 Cl. & Finn.) the corresponding passage is otherwise worded: "He must be considered as to responsibility as if the facts as to which the delusion exists were real," which indeed at least impliedly comprises the first inaccuracy.

such. Unfortunately the English, like the German Criminal Law rejects this distinction, and further, if *mens rea* cannot be attributed to the principal in the first degree, the participation cannot be punished.¹ "For there will be no foundation on which the accessory crime can rest." But yet, in spite of its disinclination to treat complicity in an innocent act as punishable, the English Criminal Law like the German and by the same roundabout way does succeed in punishing such complicity by treating the guilty party as an indirect principal. "If an offence be committed through the medium of an innocent agent, the employer, though absent when the act was done, is answerable as principal,"² *i.e.* as a principal in the first degree. In a true sense, indeed, is this third difference between justifiable and excusable offences current law.³

4. There is another difference, which, however, need here only be mentioned. The consequences which follow in private law from justified and from excusable offences are different. Civil damages cannot be claimed if the act is justified.

Doctrine of Necessity.—Some well-recognized practical consequences are therefore bound up with the distinction between Justification and Excuse. But it also serves to illuminate some questions of doctrine which are still somewhat obscure. The doctrine of necessity, for instance, is so far obscure that it is not clear whether it would be regarded as a form of justification or as a mere excuse. A passage has already been cited from the judgment in the *Mignonette Case* which shows that the distinction between the conceptions of justification and excuse is yet to seek; the whole tenor of the judgment shows this clearly. The doctrine of necessity is sometimes so conceived as to suggest⁴ that the act is excusable by reason of the severity of the temptation to which the doer was subjected; at other times, however, justification is made to depend upon the value of that which was destroyed as compared with the value of that which was saved.⁵ It is impossible to escape the impression that the erroneous assumption that acts such as those in the *Mignonette Case* might be treated as *justified* brought it about that the court could not bring itself to regard them as *excusable* and preferred rather to leave their equitable treatment to the sovereign's mercy. In general the impression is that the strong reluctance of the English Criminal Law to recognize necessity as an excuse

¹ *R. v. Taylor and Price*, 8 C. & P., 616. As opposed to this view see particularly the outstanding book by Kantorowicz, *Tat und Schuld* (1933).

² *Reg. v. Manley*, 1 Cox 104.

³ I am, of course, aware that the importance of the distinction between the various forms of complicity is small in the English law.

⁴ "It must not be supposed that in refusing to admit *temptation* to be an *excuse* for crime it is forgotten how terrible the temptation was. But a man has no right to declare *temptation* to be an *excuse*."

⁵ "By what measure is the *comparative value* of lives to be measured? Is it to be strength or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will *justify* him in deliberately taking another's life to save his own."

has its origin in the dread lest weakness and cowardice should seem thus to be justified. In actual fact we may distinguish two points of view from which acts done under the plea of necessity may be treated as free from punishment, giving rise to two very different cases of necessity. In the first case the necessity may arise from a danger of such magnitude that the instinct of self-preservation would overwhelm the sense of duty even for men not in general faint-hearted. This is the "necessity" which makes the act excusable. But on the other hand, we may treat as a case of necessity one in which a valuable common interest which is endangered is preserved by the sacrifice of some less valuable interest. In such cases the gratitude of the community is due to the person who acts; the act is not merely pardonable, but praiseworthy. This is the "necessity" which justifies the act. Under which conditions each form of the case of necessity is to be recognized as a ground for freedom from punishment will not here be made the subject of particular inquiry.¹ It was only desirable to point out how profound is the influence which may be exercised by apparently purely theoretical distinctions such as those between justification and excuse.

We will, however, pursue the same line of argument with reference to the third fundamental characteristic of an offence.

Doctrine of "Typicity."—Illegality, *i.e.* absence of justification, and Guilt, *i.e.* absence of excuse, are attributes of a substantive thing, namely of the *actus*, if we adhere to the adage: *actus non facit reum, nisi mens sit rea*. The offence is an illegal (*rechtswidrige*), guilty (*schuldhaft*) action. But such an action may be defined even more narrowly. Not every illegal, guilty action is punishable; rather is it the case that actions which are punishable, such as murder, manslaughter, rape, larceny, burglary, are defined in detail in common or in statute law. The definition of a particular form of offence is, in German criminal science, termed *Tatbestand des Verbrechens*,² an untranslatable phrase, or type of the offence (*Typus des Verbrechens*). The action which constitutes the nucleus of the offence is thus, to put it more precisely, the materialization of the *type* of a certain kind of offence. This is termed "typicity" (*Tatbestands-mässigkeit*).³ This "typicity" is the essential mark of the offence. The first question to be asked when the issue is raised as to whether an action is an offence is whether it comes within any of the special crime categories of common or statute law. Until this is settled

¹ To the Continental jurist it seems strange to find the problem of necessity described as "not of supreme importance in English law" since merely nominal punishment or pardon is possible (Stallybrass, *Journ. Comp. Leg.*, vol. xiv, pt. iv, p. 237). In my opinion this attitude depreciates the ethical significance of a conviction even followed only by nominal punishment or no punishment at all.

² This conception is a development from that of the *corpus delicti* mentioned by Austin in Lecture 24.

³ Kantorowicz (*loc. cit. supra*) discusses the systematic relation between typicity and illegality on the one hand and fault (*Schuld*) on the other. I agree with his views, but for the sake of simplification avoid details here.

there is no purpose in raising the question of illegality or guiltiness. Once established, the fact that the act was of an illegal and of a guilty character requires normally, according to English law, no further demonstration; the presence of these characteristics is presumed; ¹ the onus of proof of justification or excuse falls regularly on the defendant. Yet, in another aspect, the typicity is fundamental for the *mens rea*: the "type" of the offence is decisive for the question as to which characteristics and consequences of his act must have been known and foreseen by the doer for its commission to be treated as intentional.

Scope of Intention in English Law.—This principle is also recognized in a limited manner by the English law. The "type" of homicide is so conceived as to include the killing, in general, of a reasonable creature, *i.e.* of any human being whatsoever. He who willed to kill a human being and has killed a human being is accordingly guilty of an intentional homicide, of murder even though, indeed, because of an exchange of the persons or a deviation of the assault a human being other than the one intended was killed.² He is also guilty if he willed to kill no particular person but any chance wayfarer. This latter form of intention is termed "universal malice" or "malice against all mankind," but in essence the intention of every murderer so far as it is legally relevant is a "universal malice" or a "malice against all mankind." For the issue is not whether there was an intention to kill a particular human being, but whether there was the general intention, implied in the particular intention, to kill a human being.

Though the English decisions insist that the more special intention is legally irrelevant provided the intention is of the type required for the offence in question, yet they have not required with the same energy that, on the other hand, the intention is insufficient if it be more general than that of the type. Rather is it held throughout that "the guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law."³ How far the intention may depart from the type as defined by law is a question upon which there is no unanimity. The most conservative view is that the intention need not, indeed, bear upon the particular type as defined by law of the offence in question, but must be directed to some criminal act even if it be one less serious than that now in issue. One who acts with a criminal intention "runs the risk of his crime resulting in the greater crime." Ignorance of facts, accordingly, only excludes intention if "these facts would, if true, make his act no criminal offence at all."⁴ A more comprehensive view does not require criminal intention, but allows any illegal intention to

¹ Kenny, *op. cit.*, pp. 40, 41. [In this connexion it is now relevant to consider the important decision of the House of Lords in *Woolmington v. Director of Public Prosecutions*, (1935) 25 Cr. App. R. 72.—EDITOR.]

² *Rex v. Saunders*. Foster's Crown Law, p. 371.

³ *R. v. Tolson*, 23 Q.B.D. 168.

⁴ Brett J. (as he then was) in *R. v. Prince*, L.R. 2 C.C.R., p. 154.

suffice, even if it be directed to an act which is a trespass, a tort only.¹ Consequently mistake will only exclude intention if, in the circumstances in which the doer believed himself to be acting, the act would not have been a wrong, not necessarily a punishable wrong. Finally an even broader view demands not even an illegal but merely an immoral intent and treats mistake as irrelevant if in the circumstances in which the doer believed himself to be acting his act would have been immoral: "he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which he in fact was committing,"² where wrong is not to be understood as "illegal"³ but as "wrong in itself and apart from positive law," "not only criminal, but also immoral,"⁴ i.e. contrary to Austin's "positive morality." This treatment has a connexion with the Canon Law doctrine, "*versanti in re illicita imputantur omnia quae sequuntur ex delicto*," and has also prevailed on the Continent at an earlier stage in the development of Criminal Law.⁵ These principles are also applied in the case of homicide. It has been too little remarked that malice aforethought in murder is only a particular application of the general doctrine that the intention comprises all the consequences, as well those unforeseen as those unforeseeable, which follow an action which in any sense is reprehensible, criminal, illegal or immoral. In the case of murder the inclusion of the unforeseeable consequences in the malice aforethought, i.e. in the intention, is restricted to the special case in which there is felonious intent. But all other cases of homicide accompanied by intention in this broader sense constitute manslaughter. The lower limit of manslaughter cannot be established without taking into account this general doctrine as to the imputation of unforeseeable consequences since it is improbable that it will be more narrowly applied here than in the case of less serious offences.⁶

According to each of these three opinions, we are dealing with a presumed intention in relation to an actual offence, with a presumed *mens rea*, or, as the phrase goes, with a constructive crime. "I have a great abhorrence of constructive crime," remarked Field J. (as he then was) as early as 1883.⁷ Many examples may indeed be given in which the doctrine leads to an absurdity; of these the most grotesque is that in which a burglar falls into a cellar and is killed, with the consequent verdict of

¹ *R. v. Fenton I. Lewin*, 179.

² Per Denman J. in *R. v. Prince*. His view was shared by eight of the judges, but according to Kenny is only "obiter" (Kenny, *op. cit.*, edition 1933, p. 42).

³ "I do not say illegal, but wrong," per Bramwell B. in *R. v. Prince*.

⁴ *R. v. Tolson*, 23 Q.B.D. 168.

⁵ Mannheim, "Mens rea in German and English Law," *Journ. Comp. Leg.*, vol. xvii, pt. iv, pp. 237 ff.

⁶ As against this, Fifoot in *Stephen's Commentaries*, 19th ed., vol. iv, restricts intention in manslaughter more closely. See p. 12: "An intention to commit a tort is enough"; p. 50: "Manslaughter must be confined to cases where the tort in question is one involving the reasonable possibility of physical harm." See also *R. v. Franklin*, 15 Cox 163.

⁷ *R. v. Franklin*, 15 Cox 163.

felo de se.¹ In the case of murder the doctrine may be said to be in retreat since it tends more and more towards a fusion of felonious murder with another case of constructive murder, namely, killing by acts dangerous to life. "I think," said Mr. Justice Stephen, "that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder."² The postulation of a murderous intention can in this case be based on the presumption (which for the rest is only a *presumptio juris*, not *de jure*) "that a sane adult is presumed to intend all consequences likely to flow directly from his intentional conduct."³ But this limitation of murder merely involves a corresponding extension of manslaughter. For the general rule stands all but undisputed,⁴ namely, that the intention does not need to be directed towards the accomplishment of the fact which constitutes the particular offence, but may be directed towards any criminal, or, it may be, any illegal, or, it may be, any immoral purpose.

Yet, notwithstanding criticism, justification of this doctrine is not entirely lacking. On this basis Oliver Wendell Holmes has built up a complete theory of fault in his classical work on *The Common Law*.⁵ From the subordination of the individual to the purposes of the community it follows that punishment cannot be measured by the measure of individual fault. The only course open is to take the "average man" as a measure; a man is blameworthy where a man of average capacity would be blameworthy, he must bear the burden of the risk of any deviation from the average which results from his temperament, his ignorance or his folly. In every case of criminal, illegal, immoral intention there is present, says the legislator, a danger of injuries of many kinds which are within the powers of perception of an average man. These must, accordingly, be taken into account by all and sundry.⁶ We agree with Holmes that the fault of the individual must be measured by the standard of the average man. But on the one hand, if this is the only standard the lower limit of fault can indeed be fixed, the minimum standard of negligence, but not what is requisite and adequate for the more serious grades of fault and in particular for intention, and this was the very question which Holmes set himself. And on the other hand, the limit of negligence is also brought too low if Holmes seeks to measure not only prudence but also intelligence by the standard of the average man. Stupidity is a

¹ 126 L.T.N. 60. Stroud, *op. cit.*, p. 169. Compare Bacon, *Maxims of the Common Law*, Regula 16.

² *R. v. Serne*, 16 Cox 311.

³ Kenny, *op. cit.*, p. 333.

⁴ Austin, indeed, speaks of this doctrine as a peculiarity and seeming unreasonableness of the English Criminal Law (Lect. II at p. 1094). See also J. W. C. Turner in *Camb. Law Journal*, vol. vi, pp. 50 ff. (1936).

⁵ *The Common Law* (1881), pp. 48 ff.

⁶ So also Clark, *op. cit.*, pp. 52 ff.

misfortune, not an offence, and if with Holmes we aim primarily at deterring and decree deterrent punishments against stupidity we are acting much like Dr. Johnson's schoolmaster, Mr. Hunter. "He used," so Johnson told Boswell, "to beat us unmercifully; and he did not distinguish between ignorance and negligence; for he would beat a boy equally for not knowing a thing as for neglecting to know it. . . . Now, Sir, if a boy could answer every question, there would be no need of a master to teach him." It is possible to measure by a normal standard the degree of attention requisite for the anticipation of harm, but the requisite intelligence is measurable only by the capacities of the doer. Holmes, consequently, has not succeeded in establishing the extent of intention or even of negligence in relation to all the consequences of any action performed with a criminal, illegal or immoral purpose.¹

"The law is concerned to investigate a man's state of mind in relation to the legal character of his acts, not in relation to their ethical or moral character," says Stroud (p. 10). We should go farther: the law is concerned to investigate a man's state of mind not in relation to the law or to the criminal law in general, but in relation to that rule of the criminal law which he has broken. More precisely: ignorance of fact then excludes intention when the action of the doer in the circumstances assumed by him would not fit the type of the offence.² The type of the offence in issue will not only describe the punishable act but, by implication, a defined criminal disposition of the mind. The punishment of theft is based upon the existence of a thievish disposition; that of bodily injury, upon a violent disposition; that of rape, upon a lustful disposition, not upon any criminal, illegal or immoral disposition at choice. Appropriately varying penalties are adapted to each particular disposition; it would be contrary to this principle if the punishment designed for a particular act should be made to fall upon a disposition which seeks a less serious, or quite other act. If the doer intending to commit some less grievous form of punishable act in fact commits a more serious form of the same act owing to circumstances which are unforeseen by him and unforeseeable, he will be punishable only for the less serious form. If a person intending to commit an offence, *e.g.* larceny, in fact brings to pass results which accord with the type of a quite different offence such as murder, as a result of circumstances which were not foreseen or foreseeable by him, he cannot be punished for either of these offences, not for murder since the special *mens rea* was wanting, nor for theft if that offence had rested in mere intention, and had not taken form in the overt act which would have constituted an attempt. This limitation of not only the punishable act but of the punishable disposition by reference to the special type of the offence, is a weighty guarantee of the "certainty" of the law.

¹ See also Keedy, 22 *Harvard L.R.*, pp. 84 ff.

² In conformity with this see, per Shearman J. in *Allard v. Selfridge*, (1925) L.R. I.K.B. 129, "criminal intention or an intention to do the act which is made penal by statute or by the common laws."

“Englishmen are ruled by the law, and by the law alone,” said Dicey.¹ “A man may, with us, be punished for a breach of law, but he cannot be punished for anything else,” even, we may add, for the bare intention to break some other rule of law or some moral precept. If a disposition blameworthy in some respect or another, but not closely related to the act in fact committed, is made to suffice as a ground for punishment, we are entering the perilous track which leads to a system of punishment of mere thought, a system without fixed limits. A tendency to relax punishment without regard to the type of the offence as established by law, as also the punishment of the disposition without regard to its embodiment in action, have ever been tokens of the downfall of civil freedom in a community. The certainty of law is closely bound up with the idea of definition of the facts which constitute the offence in its two-fold duty of fixing the limits of the acts and the limits of the intention which is punishable.

The purpose of this essay is to show that systematic jurisprudence is more than a general survey designed to ease legal study. Ultimately, as is the case with form generally, the systematic form of the science of law is the matter itself, pregnant with practical consequences and in close relation to the essentials of legal and civic life. Systematic study of law is neglected at the peril of injury to the law itself. This being so, we ask for more jurisprudence in the Criminal Law.

¹ *Law of the Constitution* (8th ed.), p. 198.

PARLIAMENTARY PRIVILEGE IN JAMAICA.

[Contributed by W. L. BURN, ESQ.]

DESPITE the mass of books and articles which have been written about the American Revolution, it is still possible to see that the most effective cause of that revolution was not a particular theory of politics or economics but the conflict between the Imperial Parliament and the complex of interests which had grown up around the Colonial Assemblies. The privileges claimed by the Assemblies are, therefore, not only interesting for comparison with those claimed by the House of Commons, but important as outlining the constitutional pretension of these bodies. The case of Jamaica is particularly worth study, for while the Assembly in 1774 held a view of its powers almost identical with that of the Continental Congress the history of its claims can be followed for another ninety years.

The privileges claimed by a legislative body may bring it into conflict with the Executive, with its own members and with members of the general public. The history of the Jamaica House of Assembly affords instances of all three, from the case of William Beston, who was committed by the Assembly in 1664 for refusing to take his seat in it¹ to that of Lord Sligo, who was instructed by the Colonial Office to apologize for the breach of privilege which he had committed when, in February 1836, he had sent a message to the House regarding a matter at issue between that body and the Council.² But it is in the relations of the House with members of the public that its claims—perhaps the most extravagant made by any such legislature of the Old Empire—are best seen.

They were of somewhat later origin than its claims over its own members, for in 1674 when one Captain Knapman abused "the Assembly in scurrilous words, viz.: that they were knaves and fools, and made laws to suit their own purses and lay burdens upon his and others" the objects of his abuse could only ask the Governor "speedily to call a Council and by some legal way bring Knapman to condign punishment."³ Three years later, however, Story, an attorney who had filed a bill in

¹ *Interesting Tracts Relating to the Island of Jamaica . . . Which Throw Great Light on the History of that Island from its Conquest down to the year 1702*, pp. 282-4 (St. Jago de la Vega, 1800).

² P.R.O., C.O.140/126, pp. 262-4; C.O.137/211, Sligo to Glenelg, No. 472, May 25, 1836.

³ *Calendar of State Papers, Colonial Series, America and West Indies, 1669-74, 1274.*

Chancery on behalf of Martin, a recalcitrant Assemblyman, and against the Speaker, was compelled to make a formal recantation, acknowledging that his action " was against the undoubted rights and privileges of the House." ¹

The year 1713 revealed a rapid and startling development of privilege. The Privy Council passed on to the Commissioners for Trade and Plantations a petition of one Saunders whose endeavours to obtain legal relief against an Assemblyman, Elye, had been thwarted by Elye and the House. The Board of Trade examined " two gentlemen of Jamaica and learnt from them that no Court in Jamaica would take cognizance of any suit or application in which privilege was claimed and that several members of the Assembly used their privilege to escape payment of their just debts." It proceeded to report that as there was no reason for claiming such privilege and the Governor had no right by his Commission or Instruction to grant it Saunders was to have liberty to proceed with his case. ²

In October 1762 Governor Lyttleton wrote to the Board of Trade of the grave situation which existed in Jamaica and of the difficulties " not accidental or temporary only " which he experienced in combating the pretensions of the Council and Assembly. The Council, " originally a Privy Council to advise the Governor," had of late assumed " as far as possible the functions of the House of Lords," and the House, in addition to insulting the Board of Trade, had taken the House of Commons as its model. " Whatever the Assembly have found upon consulting the journals of the House of Commons to have been constitutionally done there, they have judged to be of sufficient authority for them to proceed in the same manner here." ³

This was the prelude to the events of 1764-6 when *Olyphant's Case* afforded the House an opportunity of advancing its claims at length. In December of 1764, Wilson, a deputy of the Deputy-Marshall, McNeil, executed on the coach-horses of Olyphant, then a member of the House, a writ of *venditioni exponas* at the suit of one Pierce Cooke. The House, on Olyphant's petition for protection, had Cooke, McNeil and Wilson taken into custody for breach of privilege. Cooke and McNeil thereupon applied to the Governor, as Chancellor, for a writ of *habeas corpus*,

¹ *Calendar of State Papers, Colonial Series, America and West Indies*, 1677-80, 209.

² *Acts of the Privy Council of England, Col. Ser. vol. ii* (1680-1720), 1184; *Journal of the Commissioners for Trade and Plantations from February 1708/9 to March 1714/15*, pp. 430, 431.

³ *A.P.C., Col. Ser. (Unbound Papers)*, 550. In 1755 the Attorney-General (Murray) and the Solicitor-General (Lloyd) had remarked cautiously of a claim of the Jamaica House of Assembly, " What the assembly claims seems analogous to the law and practice here; but it does not from thence necessarily follow that it is, or ought to be, the law there; that must depend upon their own constitution and usage, which, without further light, we cannot venture to give an opinion on." George Chalmers: *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*, vol. i, pp. 395-6 (2 vols., London, 1814).

which was granted them, the House being at the same time prorogued for one day. On December 19th the House defined the privileges of the members at length,¹ excluding cases of treason, felony, breach of the peace, forcible entries, forcible detainers, refusal to pay taxes or parish dues, but including for each member "the privileges of his person against arrests and imprisonment in such a manner as has heretofore been used and accustomed." It added two important resolutions: "that to assert that this house has no power of commitment, but of their own members, tends to the subversion of the constitution of the house"; and "that no person committed for breach of privilege, by order of this house, ought to be discharged during the session of the assembly, but by order and warrant of this house." A messenger, Bolt, was sent to take Cooke and McNeil into custody once more; and once more the Governor, having them brought before him on a writ of *habeas corpus*, ordered their release.

On December 21st, the House, in Committee, declared that the Governor had been "guilty of a flagrant breach, contempt and violation of the privileges of this house and the liberties of the people," refused to do any business until "ample reparation" for this breach had been made and ordered Cooke and McNeil once more into custody. On the following day it was prorogued and immediately afterwards dissolved.

When the new House met in March 1765 the Speaker made his usual demand for privileges, liberty of speech, freedom of debate, access to the Governor and freedom from arrests for the person and goods of members and their attendants. Lyttleton granted the privileges "as far as they are agreeable to law and not repugnant to His Majesty's commission and instructions to me"; but sent to the Speaker a copy of his 13th Instruction which forbade him to allow the privilege of protection from suits at law to the servants or the goods of Councilmen or Assemblymen, whose persons alone were to be protected. The House ignored the Instruction, petitioned the Governor to have the record of the *habeas corpus* proceedings expunged from the Chancery records; and was dissolved. At the meeting of the new House in August 1765 the Speaker refused to ask for the usual privileges and dissolution followed three days after the beginning of the session.²

When the next session opened, in June 1766, Lyttleton had left the island and the Government was in the accommodating hands of the Lt.-Governor, Elletson. His conciliatory speech emboldened rather than placated the House, which proceeded to call various persons to account for their shares in the actions of which it complained. McCulloch,

¹ *The Privileges of Jamaica Vindicated; with an Impartial Narrative of the late Dispute between the Governor and the House of Representatives, Upon the Case of John Olyphant Esq., A Member of that House. Jamaica, Printed; London, Reprinted 1766. A New Edition, Revised, Corrected and Considerably Enlarged to Which is Added a recent Case of Breach of Privilege*, pp. 57-8 (Jamaica, 1810).

² *The Privileges of Jamaica Vindicated*, pp. 57-8.

attorney for Cooke in the action which he had commenced against Bolt for false imprisonment, and the hitherto indomitable Cooke himself were once more arrested and, appearing before the House, made their apologies and were released on payment of their fees.

On July 1, 1766, the Committee of the whole House passed a number of resolutions on this subject of privilege, of which the four quoted below were the most important :

That neither the Court of Chancery nor any other court in this island hath jurisdiction, power or authority by any Act of Parliament or by any act of the governor, council and assembly of this island or by any usage or custom having the force and effect of law to determine, explain, limit or in any way determine upon the privileges of the house.

That the Chancellor and Judges of this island are not competent judges to control the jurisdiction of this house or to question or impeach the rights, privileges or proceedings thereof.

That this house is the sole, competent and proper judge of its own privileges ; and the sole, competent and proper jurisdiction by which its commitments can or ought to be examined or discharged.

That the privileges of this house are not founded on Acts of Parliament nor on royal or ministerial instructions imparted to the Governor or Chancellor of this island for the time being ; but are birthrights inherent in His Majesty's most loyal and dutiful subjects, the commons of this island and are founded on the law of Parliament, which is a part of the common law of England.¹

The House now demanded that Elletson have vacated the Chancery proceedings in respect of the writs of *habeas corpus*. To this he agreed ; and the victory of the House was largely confirmed by an Instruction of June 18, 1766. " In addition," it ran, " to the privileges allowed to the members of our council and assembly . . . there be allowed to every member of the said Council and Assembly respectively during the sittings of the general assembly . . . and six days before and after adjournment, prorogation, etc., a further privilege from arrests in all civil suits for such servants and equipages only as are absolutely necessary for the personal accommodation of such members in attending to their duties in the general assembly." Descriptions of such servants and equipages were to be made out and left with the Provost-Marshal or his deputies.²

Although this covered the point at issue it did not satisfy the House, which resolved, " That this house hath, as the representative of the people of this island, all the privileges that the House of Commons hath as the representative of the people of Great Britain ; and that any instructions from the King and his ministers can neither abridge nor annihilate the privileges of the representative body of the people of this island."³

Actually, the House was basing its claim to privilege on two foundations : its similarity in power and right to the Commons and an " inherent right " which it possessed as a legislative body. It claimed the right to

¹ *The Privileges of Jamaica Vindicated*, p. 88.

² *Ibid.*, p. 101.

³ *Ibid.*, p. 101.

punish members of the general public for constructive contempt, including in that term the bringing of a suit against its members or servants ; and although it excluded treason, felony, etc., from privilege it claimed to be the sole judge not only of the use and breach, but of the existence of such privilege. The courts of Jamaica were to be reduced (if these claims held) to the helplessness which De Grey L.C.J. attributed to the English courts in the face of Parliamentary privilege in *Brass Crosby's Case* : " The House of Commons only know how to act within their own limits. We are not a court of appeal. We do not know certainly the jurisdiction of the House of Commons. We cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges. We cannot judge of the contempts thereof : we cannot judge of the punishment thereof." ¹

In *Carmichael's Case*, in 1808-9, the Jamaica House obtained not, indeed, an acknowledgment of the theoretical validity of all its claims but a confirmation in practice of one of them. It had appointed a committee to investigate a mutiny which had taken place in the 2nd West India Regiment at Fort Augusta and that committee had summoned before it two officers. When the officers appeared they presented a copy of a general order issued by the Officer Commanding, Major-General Carmichael, which forbade them " to answer any question that the legislative body of this island may put upon the subject of a recent mutiny or upon the government and discipline of His Majesty's forces." The House, by resolution, reiterated its claim to " all the powers, privileges and immunities claimed and enjoyed by the Commons House of Parliament within the United Kingdom of Great Britain and Ireland," declared its " undoubted privileges of enforcing the attendance of all persons, civil or military," described Carmichael's action as " an arbitrary exercise of military authority and a gross violation of the most important privileges of this house "; and ordered him to attend at the Bar on December 1st. Carmichael refused to do so without an explicit order from the Governor or Commander-in-Chief, and this order the Governor (the Duke of Manchester) refused to give, adding that he agreed " perfectly " with Carmichael's policy.

The House now resolved that its privileges had been doubly violated and agreed to do no business until reparation had been made. Manchester decided to take the opinion of the Colonial Office and meanwhile prorogued the House, which at once instructed its agent in England, E. B. Lyon, in the following terms : " In any communication you may have with His Majesty's ministers it will be your duty to state that the House of Assembly claim and have ever asserted the right to exercise within this island every right enjoyed by the Commons House of Parliament within the United Kingdom . . . the right is of course asserted that these privileges can be questioned or drawn into operation nowhere but in the house of Assembly." On April 21, 1809, the Governor communicated

¹ XIX *State Trials*, 1138.

to the House the order of the Home Government which directed any officers whose evidences might be required to attend "without restrictions," and on the 26th Carmichael presented himself at the Bar of the House and apologized. The House, as before, had the last word. In an address to the Governor of April 27th, it declared that

Every right and privilege exercised by the Commons House of Parliament, within the United Kingdom of Great Britain and Ireland, being inherent in the representatives of the people of this island met in general assembly, we cannot receive as a favour, depending on the discretion of His Majesty's Government, the attendance of witnesses required by this house; nor can we recognize its authority to remove the unconstitutional restrictions attempted to be imposed by Major-General Carmichael's order of November 25th last, which supposes the power of continuing such restrictions or renewing them when deemed expedient.¹

The House had, as in 1764-6, failed to gain the acknowledgment by the Home Government of the source of its claims; but it had gained the admission of its right in practice to enforce another privilege and one which was to be most useful to it. The right to compel the attendance of witnesses before its committees enabled the House to put anyone repugnant to it to the annoyance and expense of leaving his business or estate, journeying to Spanish Town and staying there until he was given permission to go away. In particular the Special Magistrates whom the Home Government sent out to administer the Abolition of Slavery Act (1833) were scandalously penalized by this means; and Abbott, a Baptist missionary, who refused to give evidence before a committee in 1834, was committed for breach of privilege. It is proper to add that as absenteeism increased, the character of the House had declined. Composed, as it had come to be, chiefly of attorneys² and overseers, it represented a narrow, insular and deeply prejudiced class; while the witticism that "one half of its members could not afford to be in it nor the other half out of it" reflected justly enough on the character and standing of those to whom it was applied. Such men could not be expected to waive privileges which represented to them the last bulwark of the existing social order or, more immediately, stood between them and a debtor's prison.

In 1836, the case of *Beaumont v. Barrett* came before the Privy Council on an appeal from the Jamaica Court of Error. The action was on a Writ of Trespass for false imprisonment, Beaumont, who had libelled the House in a newspaper article, having been committed for contempt on a warrant of Barrett, the Speaker. The Court had had to consider two questions: Had the House power to commit for a contempt which was not an immediate obstruction to its functions? Had that power, if it existed, been regularly exercised in this case? Beaumont, who

¹ *The Privileges of Jamaica Vindicated*, pp. 105-21.

² Not necessarily lawyers but simply persons who held a power of attorney to manage the estate of an absentee.

conducted his own case with ability, argued that the Assembly was "not a Parliament but merely a Corporation to pass by-laws for the government of the island" and pointed out that it lacked, for instance, Parliament's power of impeachment. The Supreme Court, however, decided in favour of Barrett, Rowe C.J. giving judgment:

We are of opinion that in all cases of contempt the Assembly may commit, as the mere power of removing actual impediments to its proceedings would not be sufficient for the purpose of its full and sufficient protection. It must have the power of protecting itself from insult and indignity wherever offered by punishing those who offer it.¹

In November 1834 the Court of Error confirmed the decision of the Supreme Court and Beaumont declared that he would appeal to the Privy Council and that, in consequence, all Colonial Assemblies would be deprived of their "paraphernalia of power." In this, however, he was unsuccessful, and his appeal was dismissed though (owing to a doubt whether the warrant had been in quite the proper form) without costs.

The opinion of the Privy Council was delivered by Parke B.² He based his argument partly on precedent, particularly on *Olyphant's Case*, which, he held, showed that the House had power to commit. It only showed, in fact, that the House believed it had the power to do so and Parke leaned more heavily upon the necessary relation of privilege to duties. "I think it to be inherent in every assembly that possesses a supreme legislative authority to have the power of punishing for contempts and not merely such as are a direct obstruction to its course of proceeding; but all such as have a tendency indirectly to produce such an obstruction . . ." Again, "It does not appear to the Court to be necessary to define the character of the Assembly of the island—it is enough for us to consider the nature of the duties which that body has to perform and then, be it a legislative corporation or a Parliament, to determine whether the form of committing for contempt is not necessarily inherent in it to preserve its independence, maintain its dignity and accomplish the object of its institution." And again, "In the absence of all precedent it might be fairly inferred that a body constituted for the purpose of making laws for the public welfare and the good government of the island would have necessarily inherent in it the power of summarily punishing those who obstruct its proceedings, for unless it possessed this power it would be almost impossible that it should be able to perform effectively its important duties."

The similarity of this last passage to one in Lord Ellenborough's judgment in *Burdett v. Abbott*³ is too close to pass for coincidence; and

¹ J. E. R. Stephens: *Supreme Court Decisions of Jamaica and Privy Colonial Decisions from 1774 to 1923*, i, p. 433 (2 vols., London 1924).

² 1 Moo. P.C.C. 59.

³ *East* 1-163. The parallel passage is: "I have already said *a priori*, if there were no precedents on the subject, no legislative recognition, no practice or opinions in the Courts of law recognizing such an authority, it would still be essentially necessary for the Houses of Parliament to have it."

the influence of that judgment is everywhere apparent in Parke's. Admittedly the Jamaica House of Assembly must have some privileges for its own protection. But which privileges and with what limits? "Could it be expected," Ellenborough had asked, "that they [the Houses of Parliament] should stand high in the estimation and reverence of the people if, whenever they were insulted, they were obliged to await the comparatively slow proceedings of the ordinary course of law for their redress? That the Speaker with his mace should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the House?" If judgment were given for Beaumont it meant that the Speaker of the Jamaica House of Assembly must follow that course if the same circumstances arose again. From this result Parke shrank and, seeming to assume that privilege must be as completely indivisible as Austinian sovereignty, transferred, in effect, the privileges of the House of Commons to the Jamaica House. When he said, "If we adopt the language and apply the reasoning of these two learned judges [Mansfield and Ellenborough] to the House of Assembly" he was accepting the fundamental Jamaica claim.

The prestige of the House was thus strengthened in time for the crisis of its conflict with the Home Government in 1839, but the decision in *Beaumont v. Barrett* was upset in 1842 by that in *Kielley v. Carson*.¹ The appeal to the Privy Council in this case was from the Supreme Court of Newfoundland. The appellant, manager of a hospital in St. John's, had threatened a member of the Assembly who had criticized his management in the course of a debate; and, having been voted guilty of contempt, had been committed on the warrant of the Speaker, Carson. He had subsequently been released on a writ of *habeas corpus* by one of the judges of the Supreme Court and had then brought an action for trespass and false imprisonment against Carson; in which the Supreme Court had found for the defendant.

Whereas *Beaumont v. Barrett* had been heard by four members of the Privy Council, *Kielley v. Carson* was heard by twelve and re-argued before them. Parke B. again gave judgment, perhaps as an act of penance, for it fell to him to reverse as completely as possible the judgment he had given in *Beaumont v. Barret* six years before. He now denied that the privileges of a colonial Assembly were analogous to those of the House of Commons, which was part of the High Court of Parliament and possessed such powers as that of impeachment. He attacked, further, the argument of "inherent privileges" which he limited to "such as are necessary to the existence of such a body and the proper exercise of the function which it is intended to execute." "But the power of punishing anyone for past misconduct as a contempt of its [an Assembly's] authority and adjudicating upon the fact of such contempt and the measure of punishment as a judicial body irresponsible to the party accused, whatever the real facts may be, is of a very different character and by no means

¹ 4 Moo. P.C.C. 63.

essentially necessary for the exercise of its functions by a local Legislature, whether representative or not."

There remained the task of disposing of *Beaumont v. Barrett*, which was accomplished with more ingenuity than ingenuousness. "Their Lordships do not consider that case as one by which they ought to be bound in deciding on the present question. The opinion of their Lordships, delivered by myself immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment rested and therefore was in some degree extra-judicial; but besides it was stated to be and was founded entirely on the dictum of Lord Ellenborough in *Burdett v. Abbott*, which dictum we all think cannot be taken as authority for the abstract proposition that every Legislature has the power of committing for contempt. The observations were made by his Lordship with reference to the peculiar powers of Parliament and ought not, we all think, to be exercised any further."

This decision was confirmed by those in *Fenton v. Hampton* (1858)¹ and *Doyle v. Falconer* (1866).² The first of these, on an appeal from the Supreme Court of Van Diemen's Land, decided that no distinction could properly be drawn in the matter of privilege between Assemblies which derived [their powers from Statute and those which derived them from the grant of the Crown. In the second, on an appeal from the Supreme Court of Dominica, it was argued for the appellant that the dictum of Lord Ellenborough in *Burdett v. Abbott* still covered the facts of that case where a member of the Assembly had been committed for contempt "in the face of" that body. The Privy Council held, however, that it was necessary "to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberation or proper action of a Legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed or excluded for a time or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence."³

It only remains to notice the effect of *Kielley v. Carson* upon the position in Jamaica. This is illustrated by the *Case of David Ewart*⁴ in 1864, an application for a writ of *habeas corpus* on behalf of a man committed for a breach of privileges "in the face of" the House on a warrant which did not specify the cause of commitment. In the course of the

¹ 11 Moo. P.C.C. 347.

² 4 Moo. P.C.C. (n.s.) 203.

³ But where legal provision has been made by an Assembly for the exercise of privileges analogous, e.g. to those of the House of Commons, their exercise will be upheld by the Privy Council; cf. *Dill v. Murphy*, (1864) 1 Moo P.C.C. (n.s.) 487; A. Berriedale Keith, *The Constitutional Law of the British Dominions*, pp. 251-5 (London, 1933).

⁴ 2 Stephens, 1079.

constitutional reform which had been carried out in Jamaica in 1854¹ it had been laid down that "the Assembly of Jamaica shall continue to have, use, exercise and enjoy the like powers, privileges, rights and immunities as they have hitherto used and enjoyed and which of legal right appertain to and belong to them."² As their privileges had not been enumerated in detail or, as was the course coming to be generally adopted, by reference to those of the House of Commons they must be assumed to be the same as before. And this meant, in the words of the Chief Justices, "such rights, powers and privileges only as they [the House of Assembly] had legally and constitutionally used and exercised heretofore." "It was not," he said, "intended to cover or to authorize any arbitrary or tyrannical act that might have been done without resistance and without redress in times long ago by and for which I believe a multitude of instances might be produced."

The House of Assembly, therefore, must justify its claim to the privilege which it wished to exercise either by the "law of Parliament" or "as being a superior Court of Record whose commitments in like manner cannot be reviewed but by themselves." The decision in *Keilley v. Carson* and *Fenton v. Hampton* was, the Court considered, "quite conclusive that the *lex et consuetudo Parliamenti* is vested exclusively in the House of Lords and House of Commons of England and do not and cannot appertain to the supreme legislative bodies of any colony." The House of Assembly, not being a Court at all, could not be a Court of Record and therefore the warrant on which Ewart had been committed was "bad on its face and void."

Thus the Jamaica House of Assembly was shorn of its claims to inherent privileges analogous to those of the House of Commons; and two years later it ceased to exist.³

¹ Hume Wrong: *Government of the West Indies*, pp. 62-7, 69 (Oxford, 1923).

² 17 Vict. c. 29, s.1.

³ In the United States case of *Anderson v. Dunn* (6 Wheaton, Amer. Rep. 204), the Supreme Court held that the House of Representatives had, by necessary implication, general power to commit and punish for contempts, although the Constitution had only given it power to commit for such contempts committed by its own members.

RECENT FRENCH DECREES, MODIFICATION OF PROCEDURE.

[Contributed by MAÎTRE C. L. DENOYER, *Avocat à Paris*.]

Attention is drawn to the important decree modifying procedure.

Aim in View.—The first parts of the report which precede the decree are destined to remind us that our procedure has, as a whole, remained practically unchanged for nearly three centuries; the Code of Civil Procedure of 1806, in fact, closely follows the Ordinance of 1667.

Numerous modifications have been studied and numerous projects elaborated with a view to the better adaptation of such an ancient form of procedure, to the conditions, themselves much modified, of a life in which speed plays such an important part.

Very profound changes, however, run the risk of constituting a perfect revolution in customs consecrated by tradition; their *mise au point* necessitates, furthermore, a long work of reflexion.

Therefore, to expedite matters, there has been carried out, in certain points only, improvements "destined to remedy the most striking defects and the abuses most certain of an outworn formalism."

The principal modifications carried out relate to: (1) Obligations to institute conciliation proceedings. (2) Documentation of cases. (3) Judgments by default and appeal against same. (4) Reduction of the period of delay for appeal. (5) Abolition of appeal against judgment given by default when the defendant has filed an appearance, but has failed to file further pleadings.

We will review them one by one.

Obligations to institute Conciliation Proceedings.—(a) *Former State of Affairs.*—In French law, the plaintiff, before being able to sue anyone before the court, must summon the defendant before the *Juge de Paix* in order that efforts¹ may be made before this magistrate to bring about conciliation.

Art. 49 of the Procedure Code provides that in, *inter alia*, commercial cases and urgent cases, the attempt at conciliation is dispensed with.

In practice, in most cases, the plaintiff maintaining that there was urgency solicits and obtains from the President of the court an order,

¹ The judge has no power to decide; he may only enjoin the parties to make a settlement by conciliation, and signify their agreement if any, or, on the other hand, their failure to agree.

authorizing him to assign immediately before the court, without any attempt at conciliation.

(b) *Modification carried out.*—The decree-laws have not modified the categories of cases in which the attempt at conciliation is dispensed with ; as in the past, commercial cases are not therefore subject to these conciliation proceedings ; but, in civil cases, with the aim of rendering effective the obligation to attempt conciliation, the President will only be able to dispense with the attempt at conciliation by indicating expressly the reasons for the urgency.

It is provided further that the parties must appear in person ; however, if prevented from so doing, they can be replaced by a representative, but the excuse invoked must be recognized as valid by the judge.

Further, at any moment in the course of the instance, the judge in charge of the case is empowered to bring the parties together in order to make a new attempt at conciliation.

If, under the mediation of the judge, an agreement is reached, an official report is drawn up which can be enforced in the same way as a final judgment.

It is the judge of the defendant's domicile who is competent to make this attempt at conciliation.

Documentation of Cases.—The decree-law provides that there shall be constructed a file for each case at the registrar's office ; this file is intended to receive a copy of the documents of procedure, of the judgment, etc., and will accompany the case before the different judicial bodies.

This is a material question of organization into which it is useless to probe farther.

A further innovation : from the commencement of the case, the President of the court must appoint a judge to superintend the procedure.

With the intention of accelerating the procedure, this judge, at the instance of one of the parties, and after having heard them, will be able to decide that inquiries shall be instituted.

Judgments by Default—and Appeal against Same.—The modifications made in this respect have the object of accelerating procedure and of preventing the defendant in bad faith from delaying final judgment.

It must be remembered that a case, generally speaking, is submitted to two degrees of jurisdiction : the Court of First Instance and, on appeal, the Court of Appeal (except when the amount involved in the case does not exceed certain figures, in which case the decision of the Court of First Instance is final). The Court of First Instance is itself divided into the Civil Court, for civil affairs, and the Commercial Court, for commercial affairs. It must also be remembered that if the defendant sued before the court does not appear, the plaintiff may take judgment by default ; but in this case the defendant may appeal against that judgment. If so, the case comes again for judgment before the same court ; this does not prevent the defendant from making an appeal later before the higher court. If the defendant appears, but fails to lodge further pleadings, the

judgment given by the court is still by default and the defendant may appeal against it.

A case might occur in which the defendant does not appear when summoned; the plaintiff then takes judgment by default. The defendant makes appeal and judgment against him after hearing is over in the Court of First Instance. The defendant then appeals and the case is brought before the Court of Appeal. Should the defendant fail to lodge further pleadings, the plaintiff is then obliged to take judgment by default against which the defendant could still make appeal. Clearly there is a possibility of abuse of procedure.

Moreover, there is no period of delay for making appeal against a judgment by default, as this appeal could be made up to the time of the enforcement of the judgment.

The modifications carried out vary according as to whether it is a question of procedure before the civil courts or before the commercial courts.

(a) *In Civil Matters*.—Henceforward, there will be no more judgments by default when the defendant has filed an appearance but has failed to lodge further pleadings. If the defendant who has appeared does not lodge his pleadings within the period of delay of which notice is made to him, so much the worse for him; the judgment will be final.

If the defendant does not lodge an appearance, the plaintiff can take judgment by default, but in that case, the period of delay in which appeal may be made has been limited to a month: (1) if a copy of the judgment by default has been served on the defendant personally; (2) if it has not been possible to serve a copy of the judgment on the defendant personally, but an extract of the judgment has been published in a journal specified by the President of the court; the delay of a month dates from publication; (3) if the defendant has had knowledge of the judgment.

Apart from these three cases, the previous law is still in force, that is to say, the possibility of making appeal up to the time of the enforcement of the judgment.

If the plaintiff, having a date fixed for a hearing, does not appear, the defendant also may himself take judgment by default.

(b) *In Commercial Matters*.—The only modification carried out is that the period of delay in which appeal to a judgment by default may be made is reduced in all cases to eight days.

On the other hand, the judgment by default when the defendant has lodged an appearance but has failed to lodge further pleadings will continue to exist, which is difficult to understand.

Reduction of the Period of Delay for Appeal.—In civil matters, as in commercial matters, the period of delay in which an appeal could be entered was two months, counting from the day that a copy of the judgment was served on the defendant; the period of delay was extended if the defendant's domicile was some few miles out of the district of the Court of Appeal or outside France.

The delay is reduced to one month in civil matters, without the delay of distance being increased for those who live in France ; the delay is the same for those living outside France.

In commercial matters the period of delay was still two months ; this was certainly a contradiction, which had not been designed and which must result from an omission in the texts. This omission has been repaired, and a new law passed on April 9, 1936, has laid down that the period of delay for commercial matters will only be of one month.

The decree also provides for detailed arrangements of such a nature as hasten the solution of the appeal : when the *conclusions* of the appellant appear to the court to be without serious motive ; when the case appears to necessitate an inquiry, or presents an urgent aspect, or appears to necessitate only short pleadings.

A COMPARATIVE STUDY OF THE ANTI-TRUST LAWS OF THE BRITISH DOMINIONS AND OF THEIR ADMINISTRATION.¹

[Contributed by PHILIP STRICKLAND, ESQ., B.A., LL.B.]

Introduction.—Our purpose is to trace, from the first statutory departure from the common law, the course taken by each of the British Dominions in its efforts to develop a system of laws which would successfully combat such combinations in restraint of trade and monopolies as are considered in that Dominion to be contrary to the public interest ; and to compare the practical utility of the systems so developed. In all of the British Dominions the law applicable to any field is the common law of England, in so far as consistent with, and not abrogated by, the statutes of those Dominions. The Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand have all found the common law relating to trusts to be unsatisfactory, and have therefore developed statutory systems of their own, abrogating or altering the common law.²

I. CANADA.

Constitutional Authority.—Under the British North America Act of 1867,³ s. 91, certain powers are vested exclusively in the Parliament of Canada. Head 2 of s. 91 deals with "Trade and Commerce," and head 27 with "The Criminal Law, Including Procedure in Criminal Matters." Parliament in dealing with these matters is not limited by any intra-State jurisdiction residing in the Provincial Governments.⁴

¹ This study has been prepared in connexion with the course on Comparative Law given at Columbia Law School by Professors Deák and Jervey during 1934-5, on the British, American, French and German Law of Restraint of Trade.

² It was not until the common law had become fully developed, and had been applied to allow restraints and monopolies, that it was found necessary in the Dominions to legislate in order to change that common law. By the year 1890 most contracts in restraint of trade were found to be enforceable, and it had become unheard of to prosecute the parties to those which were found to be unenforceable. Thus, regardless of business conditions and wealth centralization, no legislation would have been necessary in any Dominion prior to about 1890.

³ 30 & 31 Vict. c. 3 ; Statutes of Canada 1867, p. 2.

⁴ Though there is little doubt that combinations in restraint of trade fall within head 2 of s. 91 of the British North America Act, whenever the question has arisen in the courts the jurisdiction of Parliament has been found to exist under some other head of s. 91, because it has never been established beyond doubt that jurisdiction over a field as broad as Trade and Commerce would in itself be sufficient to support

The enactment of statutes designed to combat the growth of trusts has been facilitated because trusts fall within the scope of Federal jurisdiction under s. 91, head 2 of the British North America Act, and because in dealing with them Parliament has power under s. 91, head 27, to make criminal such actions as it sees fit.

Accepting the power of Parliament to legislate with regard to combines, and contracts in restraint of trade, we turn to a consideration of Canadian anti-trust statutes. Prior to the year 1888 there was no existing or proposed anti-trust legislation, and we shall therefore trace development from that date. With the exception of certain Orders in Council¹ which were in force during the World War, the various enactments viewed chronologically indicate a steady development of legal machinery designed to ferret out and dissolve all combines operating in restraint of trade to the public detriment.

In 1888, at the instigation of the Government, a committee was appointed² to examine into and report upon the nature, extent and effect of certain combines said to exist with reference to the purchase and sale, or manufacture and sale, in Canada, of any foreign or Canadian products. The committee reported that the situation was not so alarming as it might be, but was one worthy of legislation.³

The Criminal Code Provisions.—As a result of the findings of the committee of 1888, a Bill proposed by Mr. Wallace, head of the committee, was passed by the House of Commons on May 2, 1889. In 1892 this Bill was codified and revised, but its meaning was in no way altered. The revised Bill was incorporated into the Canadian Criminal Code as ss. 516, 517 and 520 (App. 1a).

The intent of the instigators of the enactment of 1889 was to change the common law in order to eradicate the evils found by the committee to exist under that common law. As the Act was drafted, however, it declared but in no way altered the law. It simply made formerly unenforceable combinations subject to a penalty.

Sir John Thompson, Minister of Justice, addressing the members the power of Parliament in any specific instance. However, the Privy Council in the case of *Proprietary Articles Trade Association v. the Attorney-General for Canada*, [1931] A.C. 310, having justified the enactment of the Combines Investigation Act of 1923, *infra*, on other grounds, stated that they were not to be interpreted as implying that the Act could not be justified under s. 91, head 2, alone.

¹ The Orders in Council of 1916 to 1918 (P.C. 2777, 3069 and 2461) were passed as protective measures against possible profit-making schemes of those seeking to take advantage of the sudden rise in prices and the shortage in supply of the necessities of life.

² By motion by Mr. Clarke Wallace before the House of Commons on February 29, 1888.

³ Appendix 3, to vol. xxii of *Journals of the House of Commons*, 1888. Combinations were found to exist in undertakers' supplies, groceries, sugar, coal, barbed wire and binder twine, stoves, Canadian Fire Underwriters Association, oatmeal millers, egg dealers, and Canadian watch case manufacturers. Outstanding were the combinations in undertakers' supplies and groceries.

of the House of Commons in regard to the proposed² legislation, stated :

When the Honorable gentleman has read, as he has done, from the face of the bill, that a person who *unlawfully* conspires to do these things is guilty of a misdemeanor and is punishable, it is impossible for him to state that the bill does not declare what the law is.¹

It was the consensus among the members who passed the Bill that it was declaratory of the existing law.

In 1900 the word "unlawfully" was struck from s. 520 (App. 1a). The Act has remained in force in the form thus given it to the present day,² and in 1906 became ss. 496, 497 and 498 of the Canadian Criminal Code (App. 1b).

Judicial Interpretation of the Criminal Code Sections.—After the omission of the word "unlawfully" from the Act, it became an offence to conspire to do "unduly" any of the things contained within s. 498. The offence became purely a statutory one, no longer depending in any way on the common law. The problem of the courts was to determine what amounted to "undue" restraint within the statute. When the word "unlawfully" was in the statute, common law tests could be applied to determine whether or not the restraints were "unreasonable" in the circumstances. When the test became whether or not the acts done were "unduly" in restraint of trade or competition, the courts had an entirely new problem. This fact was recognized in the first case to be prosecuted, namely *Rex v. Elliott*,³ decided in 1905, in the Court of Appeal for Ontario. The court in that case held that when the Legislature struck out the word "unlawfully" from s. 520 and restored the word "unduly" to subclauses (a), (c) and (d), it was intended that the Act should go beyond the common law.⁴ The court found that what is "undue" with reference to the acts which are the subject of the conspiracy, combination, agreement or arrangement is a question of fact dependent upon the circumstances of each particular case. Lessening or preventing competition "unduly" means in an undue manner or degree, wrongly, improperly, excessively or inordinately.

Subsequent to the Elliott case there were several others, none of which defined the test of legality any better than to say that restraints were

¹ *Debates, House of Commons*, April 22, 1889, p. 1438.

² In 1899 an amendment was passed by which the word "unreasonably" in subs. (c) and the word "unduly" in subss. (a), (c), and (d) of s. 520 (App. 1a) were omitted. In 1900 another amendment reinserted these words and omitted the word "unlawfully."

³ (1905) 9 O.L.R. 648.

⁴ *Ibid.*, 9 O.L.R. 648 at 660. Mr. Justice Osler ruled: "Thus we are no longer thrown back on the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles which may be the subject of trade or commerce, (c) unlawfully preventing the manufacture or production of such article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things 'unduly' which is now made unlawful and an offence within the meaning of the section."

unlawful which were undue in the circumstances.¹ One of these cases, *Rex v. Gage*,² decided by the Court of King's Bench in Manitoba in 1907, went farther than the others. Grain Buyers' Association made a rule requiring members to pay one cent per bushel less than market export price for grain, in this way ensuring one cent per bushel profit. The court held that the regulation did not amount to undue restraint of trade if it did no more than ensure a profit that was reasonable and fair. The court said that the trader had a right to contract in restraint of trade to further his own lawful interests as long as the interests of the public were not unduly impaired. This decision, while using the word "unduly" in place of the word "unreasonably" in every instance, applied exactly the same means of determination as is applied at common law. And it is only natural that the courts, being thrown into an entirely strange field, should look around for some familiar landmark by which to get their bearings. They were given an ordinary English word, and asked to give it legal meaning. They were aware that the Legislature desired that it be given a meaning stricter than that of the word for which it was substituted. But in ordinary phraseology the new word and that for which it was substituted are almost synonymous. It may be said that a thing which is "undue" is perhaps not quite as far from being morally in good grace as a thing which is "unreasonable." That seems to be exactly the distinction sought to be put into effect by the Legislature. The courts understood the desire of the Legislature, and sought to administer the Act in accordance. But having nothing but the two words from which to draw distinctions, no court of authority having determined any difference between the words, the courts in cases arising in the first years of administration of the Act were at a loss to set out any valid principles of distinction which could be applied to specific cases.

The Supreme Court of Canada in 1912, in the case of *Shragge v. Wiedman*,³ attempted to draw a distinction which would be workable when applied to a set of facts, by interpreting "unreasonable" to mean unnecessary for the protection of the interests of the parties, and "un-

¹ *Rex v. The Master Plumbers' Association*, 14 O.L.R. 295, decided in the Supreme Court of Ontario in 1905, was a case in which a plumbers' supply association and a plumbers' association agreed that the members of the plumbers' association should purchase exclusively from the supply association at prices lower than were available to non-participants. The court found that as a result of the combination common prices were fixed by the manufacturers and jobbers, and that this amounted to restraint of trade which was "undue" within s. 520 of the Code. The court said the restraint was "undue" in the circumstances, but did not define "undue."

In *Wampole v. Karn*, (1906) 11 O.L.R. 619, the court refused to grant to the Wampole company an injunction restraining the Karn company from breaches of contract on the ground that in the opinion of the court the contracts were void as contrary to the Criminal Code provisions. This was a civil suit, and the court extended the application of the statute to allow its use as a defence in civil suit, though there had been no prosecution of the plaintiff under the criminal sections.

² (1907) 13 C.C.C. 415.

³ 46 S.C.R. 1.

due" to mean oppressive to that competition from which the public has a right to benefit.

This decision definitely rejected the common law test as to enforceability of a contract in restraint of trade, and declared that under the statute the whole consideration must be given to the interest of the public. The case of *Toronto General Trust v. McEwen*,¹ decided by the Supreme Court of Canada in 1917, gave consideration to both the public and the parties to the contract. The Court disregarded its own holding in *Shragge v. Wiedman*,² and declared that a contract in restraint of trade to be unlawful must be shown to be to the detriment of the public or unreasonable as between the parties. The language used is exactly that employed in determining the validity of contracts of this type at common law. In spite of a series of decisions covering a period of fifteen years, the courts were unable to develop any lasting legal interpretation which would in any way render the application of the statute different from that of the common law.

The Criminal Code provisions failed in their purpose for three reasons.

The first reason is that they failed to express in terms which could be applied to facts any real departure from the common law. S. 496 has been held to be nothing more than a statement of the common law of conspiracy, because of the insertion of the word "unlawful." S. 497 does not create any offence, but rather excludes trade unions from the application of the statute. Subs. (b) of s. 498, if read alone, would condemn any restraint of trade. But the case of *Rex v. Gage*, *supra*, held that this subsection must be read in conjunction with s. 496, and that the two read together merely continue the law of conspiracy. The same decision held that subss. (a), (c) and (d) of s. 498 create a new statutory crime. This finding has been upheld in many decisions, and we must take it to be so, but the interpretation given to those subsections by the courts has made this new crime an approximation to the common law crime of conspiracy to restrain trade or competition.

The second reason for failure is that even had it clearly expressed a statutory offence, it could not have been applied to all cases intended to fall within its terms, because they were not sufficiently broad to embrace the form taken by some situations causing restraint of trade. For example, the statute applies to all those who "combine," "conspire," "agree" or "arrange" with other persons to do any of the things contained in the subsections of s. 498. It is possible to have unilateral restraints, to which the terms of the statute would have no application. This was illustrated in the case of *United Shoe Machinery Co. of Canada v. Brunet*,³ tried in the Quebec Courts in 1905, and finally determined by the Privy Council in 1909. The appellants leased to the respondents machines made and used for certain processes in the manufacture of shoes. Each lease contained a "tying clause," the effect of which was to prohibit the use by the respondents of any machines other than those of

¹ (1917) 54 S.C.R. 381.

² *Supra*.

³ [1909] A.C. 330.

the appellants. The respondent was free to use all or none of the appellants' machines, but some of them were the only ones which could be obtained to do certain parts of the work of manufacturing. The Privy Council held that the covenants were not in restraint of trade because the respondents were free to hire or not to hire all the machines together. The court discussed the covenants as contracts not amounting to combinations, and held that there was no application of any existing Canadian Act, because there was not restraint of trade by agreement or combination as stipulated in the Code provisions.

The third reason for the failure of the Act is that it provides no means of bringing combinations or contracts in restraint of trade before the courts for prosecution. A prerequisite to any prosecution is the gathering of sufficient evidence upon which to base a complaint. There was absolutely no provision made in the statute for any kind of investigation, or for any extraordinary means of taking evidence, which might bring to light existing combinations. The cases involving the Code provisions were either civil suits in which the validity of the contract was a point in issue, or prosecutions instigated by evidence brought to light in antecedent civil suits.

The Combines Investigation Act of 1910.—The difficulties encountered in the administration of the Criminal Code sections made it clear that the Act could never hope for success, and led to the enactment of the Combines Investigation Act of 1910.¹ Mr. McKenzie King, who pro-

¹ 9 & 10 Ed. VII, c. 9. Statutes of Canada, 1910, p. 131. There were other enactments prior to 1910 which purported to protect the public from certain practices prevailing among traders. By s. 18 of the Customs Tariff Act of 1897 (Statutes of Canada, 1897, p. 5), the Governor in Council, if he believed a combination to exist which enhanced the position of the producer or manufacturer at the expense of the consumer, could order judicial investigation. The judge so ordered was given court power to examine witnesses and to take evidence, and must report to the Governor in Council whether such detrimental combination existed. The Governor in Council, if he should find that the position of the combination was enhanced by the Custom imposed on any import, must place such import on the free list, or so reduce the duty on it as to give to the public the benefit of reasonable competition in such article or commodity. In 1904, by an amendment to the Inland Revenue Act (4 Ed. VII, 1, Statutes of Canada, 1904, p. 151), the Minister of Inland Revenue was given power to revoke any licence authorized by the Act, if a manufacturer of goods subject to excise duty:

"(a) makes a sale of any such goods, or consigns them for sale upon commission to another person, subject to the condition that the purchaser or the consignee shall not sell or deal in goods of a like kind produced by, or obtained or to be obtained from, any other manufacturer or dealer; or

"(b) makes a sale of any such goods, or consigns them for sale upon commission, to another person, upon such terms as would, in their application, give more profit to the purchaser or the consignee if he should not sell or deal in goods of a like kind produced by, or obtained or to be obtained from, any other manufacturer or dealer."

There have been no revocations of licences under this amendment, though its enactment was influenced by the failure of a prosecution in 1897 against the American Tobacco Co. of Canada under s. 520 of the Criminal Code (App. 1a), and by the subsequent finding by Judge McTavish in 1903 that the contracts made by that

posed the Bill, condemned the Code provisions because the prosecutions under them had been long fights, expensive both to the Crown and to the defendants, and because the provisions called for no investigation or publicity, two elements which Mr. King considered to be the first of all essentials in establishing the existence of improper practices and methods, and of effectively restraining them.

The Act of 1910 was never intended to depend for its success on the prosecution of combines. It was intended to act as a deterrent. Its two main features were investigation and publicity.

Investigation was to be conducted, according to the original draft of the Act, on the demand of any six British subjects who were males and citizens of Canada. Mr. Bristol, a member of the House of Commons, pointed out¹ that this might lead to innumerable investigations at the expense of the Government and to the inconvenience of the defendants, for malicious or imaginary reasons. To prevent such wholesale investigation, provision was made in the Act for a board of investigation which would be appointed only after the applicants had satisfied a judge that a combination might exist.

Investigation having been conducted, the report of the board of investigators was to be published in the *Canada Gazette*. The board was entitled to order the cessation of those practices of the combine which were prohibited by the Act, but the real force of the Act lay in the publication of the report. Prosecution for refusal to obey the orders of the board would remedy a specific instance, but prosecutions are expensive and unsatisfactory. The knowledge that certain practices would lead to investigation and publicity, on the other hand, would in great measure prevent the use of those practices.

The Act of 1910 not only substituted entirely new administrative machinery for the suppression of combines, but changed the nature of an offence by contract or agreement in restraint of trade. Restraint of competition became an offence whether or not it was "undue," and enhancing prices was prohibited whether or not "unreasonable." The Act was thus considerably more stringent than the Code sections.

The use of the Act was hindered, by the expense, not so much of investigation, but of establishing that an investigation ought to be conducted. The Act in requiring application before a judge in order to pre-

company were lawful under the amended section, in the case of *Queen v. American Tobacco Co. of Canada*, 3 Rev. de Jur. 453. The contracts provided for sales of tobacco on a consignment basis, the commission to be 2 per cent., or, if the purchaser agreed to handle the products of the American company exclusively, the commission to be 6 per cent. The prosecution failed, the court holding that the company was merely disposing of its products as it saw fit, and that there was no conspiracy to limit trade by agreement with other manufacturers.

¹ *House of Commons Debates*, 1909-10, vol. iv, p. 6908. Mr. Bristol's chief objection was the expense to defendants. His argument is weak, since if the defendant is innocent he has nothing to hide, and need not go to any expense.

vent needless expense defeated its own purpose. The only investigation conducted under the Act during the nine years of its continuance culminated in the cessation of unlawful practices, but was illustrative of the difficulty of administering the Act. Application was made for a board to investigate the lease agreements of the United Shoe Machinery Company.¹ Between the time of application in November of 1910 and the report of the Board in October of 1912, protracted litigation occurred. The United Shoe Machinery Co. was powerful and did everything it could to prevent investigation, and it was only because the applicants had strong financial backing that they were able to establish to the satisfaction of the judge before whom hearing took place that a combine existed, and to bear the expense of fighting an appeal. The machinery of the Act relating to investigation and publication was carefully formulated to have the greatest possible effect, but few could afford to bear the expense of putting it into operation.

The Combines and Fair Prices Act and the Board of Commerce Act of 1919.—In the period immediately following the World War, there were innumerable mergers, incorporations, and amalgamations because of the rise in prices and the chaotic conditions. Profit seekers, desirous of taking advantage of the public need by regulation of the none too plentiful supply of necessary commodities, and who counted on the general disturbance of the economic structure as a cloak to cover their behaviour, saw their opportunity in combination on a large scale. In 1919, to guard against such combinations, two new Acts, the Combines and Fair Prices Act² and the Board of Commerce Act³ were passed. Under these Acts, an attempt was made to reach, more effectively than had the Combines Investigation Act of 1910, all combinations which were considered detrimental to the public interest. The administrators of the new Acts were given powers greater than those given before or since under Canadian anti-trust Acts.

The new legislation condemned not only those associations or agreements which had been proved to be combines, as under the 1910 Act, but anything which the Board of Commerce deemed to be part of the process of formation of a combine. Only one complainant was necessary as compared to six under the Combines Investigation Act of 1910. Provisions were contained in the 1919 Act against the charging of unfair prices, whether or not the ability so to charge was brought about by unlawful combination. The Board was given power to determine what constituted

¹ Application was made before Judge Cannon of the Superior Court of Quebec, who found that a "combine" within the meaning of the term as used in the Act existed, and issued an order for an investigation. The board was appointed on March 16, 1911. The majority of the board found that a combine existed, and the company was ordered to remove and did remove certain objectionable clauses in its lease agreements. (Order published in *The Labour Gazette*, Nov. 1912, pp. 464-76.)

² 9 & 10 Geo. V, c. 45.

³ *Ibid.*, c. 37. The Board of Commerce created a Board to administer the Combines and Fair Prices Act. The two Acts were to be read together.

a fair price, and to make orders regulating the distribution of commodities by individual firms. The Board of Commerce, having complete powers of administration, and being constituted a court of record from which no appeal lay as to the facts, was able to commence investigation, prosecute combines and render and enforce judgments.¹

In January, 1920, the Board of Commerce issued an order requiring all existing or proposed combinations to report to the Board as to their objects and fields of operation, and at the same time to give evidence to show that they would not operate to the public detriment.² Combines not complying with such order were to be presumed to be operating to the public detriment. Following this order numerous examinations took place.

In 1921 the Acts of 1919 were declared *ultra vires* the Parliament of Canada by the Privy Council³ on the ground that they interfered with the exclusive jurisdiction given to the Provincial Governments under the Head of "Property and Civil Rights Within the Province," by s. 92, subs. 13 of the British North America Act.⁴

The Acts of 1919, though they gave the Board of Commerce powers which were unconstitutional, were indicative of the trend in Canada towards the use of purely administrative machinery for the repression of combines. The criminal provisions had stressed the importance of properly defining the nature of an offence, and left to the courts the enforcement of the Act. The Combines Investigation Act of 1910 had attempted to overcome the difficulties of administration experienced under the Code, and to define in more concise terms the nature of an offence against freedom of trade or competition.

The Act of 1910 in its definition of a "combine" was well drafted, and

¹ Mr. McKenzie King referred to the Board of Commerce Act as follows: "It had functions which seldom are combined in any one body, that namely of beginning investigation, of laying information, of prosecuting, of pronouncing judgment and seeing to the enforcement of that judgment." *Debates, House of Commons*, 1923, vol. 1, p. 989.

² Order No. 63, first annual report of the Board of Commerce.

³ *Price Brothers & Co. v. Board of Commerce*, (1921) 54 D.L.R. 286. The Board under the Act was given power to determine what things should be necessities of life. The Board termed newsprint a necessary of life. The Supreme Court of Canada held that necessities of life meant necessary to the physical life of the individual, and that the jurisdiction of the Board was subject to this limitation. Thus the Act was limited in its application to the physical necessities of life.

⁴ *Price Brothers & Co. v. the Board of Commerce*, [1922] 1 A.C. 191. On appeal from the Supreme Court of Canada by Price Brothers, five powers of the Board of Commerce were held to be an encroachment of Provincial jurisdiction: (1) the power to prohibit accumulations in the case of non-traders; (2) the power to compel surplus articles to be sold at prices fixed by the Board; (3) the power to regulate profits; (4) the power to exercise their other powers over articles produced by the householder himself for his own use; (5) the power to inquire into individual cases without applying any principles of general application. The Acts of 1919 were declared to be wholly invalid, since to be enforced at all they must encroach Provincial rights.

would have been efficient had it not been for the expense involved to complainants in securing an order for investigation of the alleged combine. The Combines and Fair Prices Act of 1919, in its effort to make the nature of an offence sufficiently broad to cope with post-war practices, regulated a field over which the Federal Government had no jurisdiction. But that Act was carefully drafted to overcome the difficulty of administration which had caused the failure of the Combines Investigation Act of 1910. Under the Combines and Fair Prices Act, the whole administration was left to one body, whose duty it was to investigate, conduct prosecutions, and enforce the Act. In this way complainants incurred no expense, and any person harmed by a combine had no reason to hesitate to seek the investigation of that combine. Each successive enactment was drafted with a view to adopting the desirable provisions, and correcting the weaknesses of the preceding Act.

The Combines Investigation Act of 1923.—The Combines Investigation Act of 1923¹ (App. 2) purports to be a consolidation of all that was desirable in the preceding series of anti-trust Acts, notably the Combines Investigation Act of 1910 and the Combines and Fair Prices Act of 1919.

The Nature of an Offence against the Combines Investigation Act of 1923.—The nature of an offence under the Act of 1923 is almost exactly that of an offence under the Act of 1910. In the former it is an offence *substantially* to control production or manufacture, in the latter to control production or manufacture. As a matter of interpretation the insertion of the word “substantially” may give the Act application in cases in which there is less control by the combine than would have been required under the Act of 1910. But this is a matter of drafting. Undoubtedly the two provisions were intended to mean the same thing.

The Act of 1923 was intended to apply only to combines which operated to the detriment of the public. In the words of its sponsor, Mr. McKenzie King :

Large combinations of capital, organizations of business in a large way, are an absolute essential if the business of our country is to hold its own in competition with the business of other countries. But just because it is recognized that it is necessary to have these large organizations of business, so the Government recognizes some restraint must be placed on the possible abuse of great power which may come into their hands. This legislation does not seek in any way to restrict just combinations or agreements between business and industrial houses and firms, but it does seek to protect the public against the possible ill effects of these combinations.²

To support criminal conviction there must be prosecution in a court. But prosecution has been rare and has usually been conducted under some other statute on the evidence collected by the Commissioner

¹ R.S.C. 1927, vol. i, p. 393.

² *House of Commons Debates*, 1923, vol. iii, p. 2520.

conducting investigation under the Combines Investigation Act.¹ Thus the interpretation of s. 1 of the Act, defining "combine," is left almost completely to the Commissioner. Commissioners are not bound by the opinions of preceding Commissioners, and so must simply give their own interpretation in each case of the Act as it stands. As a general rule, actions have been found to constitute combines if they are in restraint of trade to the detriment of the public, whether done co-operatively or individually. What constitutes detriment to the public in any case depends on the personal opinion of the Commissioner. It is impossible to gauge the accuracy of the Commissioners in their interpretation of the Act. In four cases of investigation under the Act reports were published² and prosecution followed. In three of the four cases the finding of the Commissioner that a combine existed was upheld, in one reversed.³ This gives some indication as to the accuracy of Commissioners' findings. However, cases in which the report was published and prosecution ensued were cases in which the facts revealed a bad situation, and success of prosecution was probable.

Investigation and Publication of Reports.—The failure of the Combines Investigation Act of 1910 was contributed to by the expense involved in establishing a *prima facie* case before a judge. The Act of 1923 (App. 2) overcame that difficulty by permitting application for a board of investigation to the Registrar of the Act, and giving power to the Registrar to decide whether or not investigation ought to be conducted.

The Board of Commerce Act of 1919⁴ provided for investigation by a board, without expense to the applicant, but it created a permanent Board with power to take evidence, conduct investigation, determine what combines should be prosecuted, render judgment, and enforce orders. The Act of 1923, because it was considered that the best interests of the public could not be served by leaving the whole determination of restraints of trade to one body, provided for investigation by Commissioners appointed from time to time, publication at the discretion of the Commissioner and the Minister of Labour, and prosecution in the courts.⁵

¹ Following an investigation of an alleged combine in the distribution of fruit and vegetables, members of the combine were convicted and fined under the Secret Commissions Act (s. 504 of the Criminal Code, R.S.C. 1927, c. 6), and were convicted of conspiracy to defraud, in *Rex v. Simington*, (1926) 45 C.C.C. 249. In this case and four others charges were laid under both the Combines Investigation Act of 1923 and the Criminal Code sections. These cases were *Rex v. Singer*, (1931) O.R. 202, 56 C.C.C. 381, *Rex v. Alexander*, (1932) 2 D.L.R. 109, *King v. Famous Players Canadian Corporation*, (1932) O.R. 307, and *The King v. Canadian Import Co.*, (1933) LXI C.C.C. 114.

² *Rex v. Singer*, (1931) 56 C.C.C. 381, *Rex v. Simington*, (1926) 45 C.C.C. 249, and *Rex v. Alexander*, (1932) 2 D.L.R. 109, upheld the finding of the Commissioner that a combine existed. *King v. Canadian Famous Players Corporation*, (1932) O.R. 307, reversed the finding of the Commissioner.

³ *King v. Famous Players Canadian Corporation*, *supra*.

⁴ 9 & 10 Geo. V, c. 37.

⁵ Cf. Mr. McKenzie King, *House of Commons Debates*, 1923, vol. i, p. 989.

The Act provides that all reports must be published unless the Commissioner expresses the opinion that for reasons of public policy they ought to be kept secret. But in practice there have been virtually no publications. In the first eleven years of the administration of the Act there were several hundreds of investigations, but only eleven reports were published. It cannot be said that only reports which reveal bad trade practices will be published, since several have been published in which the Commissioner found no combine to exist. It may be said, however, that almost all reports revealing bad trade practices will be published, since there has been to date only one prosecution or order in a case in which no report has been published.¹

Administration of the Combines Investigation Act of 1923.—Procedure in the administration of the Act is divisible into: (1) application by six male British subjects for a Commissioner to investigate the alleged combine; (2) investigation by a Commissioner; (3) publication of the report of the Commissioner, with orders to the combine to desist from objectionable practices; (4) if necessary, prosecution of the combine and its members under the provisions of the Act, or under some other statute.

A discussion of the Reports and prosecutions conducted under the Act under these four heads illustrates the efficiency of the Act.

Application for a Commissioner to investigate presents no difficulty. As indicated above, it involves no expense to applicants, and the hundreds of investigations actually conducted are sufficient evidence that it has been taken advantage of by the public, and that it has been the policy of the administrators to allow investigation.

Investigation necessarily involves the production of documents, books and records, and the examination of witnesses. It is possible for the members of an alleged combine to hold up investigation by refusing to obey the orders of the Commissioner, and by fighting in the courts his right to conduct examination. As a result of an investigation by the Registrar into the affairs of the Proprietary Articles Trade Association, litigation and objection occurred concerning the right to investigate and the method of investigation adopted.² The Registrar found the Association to be a "combine" in that it fixed resale prices, limited competition and enhanced prices to the consumer. The Association was held by the report to be an improper method of preventing price cutting, in no way beneficial to the public, since the organization provided for a 33½ per cent. rise in prices, whereas it was found that a 20 per cent. rise would render business profitable.

¹ *King v. Canadian Import Co.*, (1933) LXI C.C.C. 114.

² The Proprietary Articles Trade Association included about 85 per cent. of the retail druggists of Canada, as well as a large proportion of manufacturers and wholesalers. Members entering the Association agreed to charge fixed prices marked up 33½ per cent. for retailers and 16½ per cent. for jobbers. The price schedule was to be released by all the members, and the cutting of prices was effectively prevented by threat of boycott.

The Association appealed the finding on the ground that it had not been given a proper hearing by the Registrar. The Minister was of opinion that the hearing had been in all respects fair, but for reasons of policy allowed the appeal, and appointed a Commissioner to conduct another investigation. The Commissioner came to the same conclusions as the Registrar. After publication of the second report, the Association temporarily ceased operation, but questioned the validity of the Combines Investigation Act of 1923 and requested the Government to refer the matter to the Supreme Court of Canada. The Supreme Court upheld the validity of the Act, and appeal was taken to the Privy Council, who upheld the decision of the Supreme Court.¹ Subsequent to the decision of the Privy Council, the Association, which was an international organization founded in England, ceased operation permanently in Canada.

The investigation of the Proprietary Articles Trade Association terminated in 1928. In the following year, an organization known as the Amalgamated Builders Council objected to investigation on the ground that it was incorporated under the Trade Unions Act, and therefore exempt from investigation and prosecution under the Combines Investigation Act. The members of the Council were prosecuted and it was held² that the Trade Unions Act was not protection to a combination such as this, which was found to exceed the legitimate purposes and objects of a Trade Union. The Trade Union exemption was held to be applicable to combinations of workmen and employees only.

The attempts of the Proprietary Articles Trade Association and of the Amalgamated Builders Council to escape the terms of the Act, if considered alone, indicate that the administrators found it difficult to make use of the machinery of the Act. But the difficulties presented in these cases involve legal questions as to the power given to Commissioners under the Act, and, once settled by a court of authority, are unlikely to recur. There may be other legal difficulties which have not yet arisen, but they will be disposed of once and for all by a court as they arise. All difficulties concerning investigation which have arisen have been determined in favour of the Prosecutor or investigator and it may be said that to-day the provisions of the Act relating to investigation are enforced without procedural difficulty. Some difficulty does exist in ascertaining the true facts, because of the natural efforts of the combines to do everything in

¹ *Proprietary Articles Trade Association v. the Attorney-General for Canada*, (1931) 2 D.L.R. 1. Their Lordships found that all of the Combines Investigation Act of 1923 (App. 2) was *intra vires* Parliament by virtue of the power given them under s. 91, head 27 to legislate with regard to criminal matters, except ss. 29 and 30, dealing with revocation of patents and lowering of Customs duties. These sections were *intra vires* the Parliament of Canada under s. 91, head 3, as affirmed by s. 122, "The raising of money by any mode of taxation," and under s. 91, head 22, "Patents of invention and discovery." Their Lordships found it unnecessary to discuss whether the Act could be declared valid on the authority of s. 91, head 2, "Trade and commerce" alone, but stated that they were not to be interpreted as implying that it could not be so upheld.

² *Rex v. Singer*, *supra*.

their power to keep their practices secret. This is a difficulty which has always and will always exist in litigation or investigation of any form, and cannot be said to be due to any fault in the machinery constructed under the provisions of the Act.

Publication of reports presents no problem in itself. The right to publish is consequent to the right to investigate, and in those cases in which investigation has been disputed, the motive of those objecting has been to prevent publication and possible prosecution, since investigation alone could do them no harm.

With regard to the prosecution of combines, the intention of the Legislature was that if publication of the report of a Commissioner should fail to effect a cessation of objectionable practices, the combine and its members should be prosecuted for an offence against the terms of the Act. The Commissioners in conducting investigation do not limit themselves to determining whether or not the alleged combine is guilty of the specific acts which under the Act would constitute a combine. It is the policy of Commissioners to investigate every detail surrounding the alleged combine. In many instances practices may be disclosed which could more successfully be prosecuted under the provisions of some other existing Act. In such cases charges will be brought under such other Act alone, or under such Act and under the Combines Investigation Act.

Six reports declaring combines to exist had been published by 1934. Of these four have been prosecuted. The members of the Nash Co. and of Mutual Brokers, brokers and jobbers of fruit and vegetables in Western Canada, were convicted of offences against the Secret Commissions Act, later s. 504 of the Criminal Code.¹ In this case charges were brought under s. 498 of the Criminal Code and under the Combines Investigation Act of 1923, but were dropped.

Members of the Amalgamated Builders Council were prosecuted under the Combines Investigation Act and under ss. 498 and 444 of the Criminal Code. The members so prosecuted pleaded guilty. Later, other members of the combine were prosecuted under the Combines Investigation Act and s. 498 of the Criminal Code, and were found guilty.²

Members of the Electrical Estimators' Association were prosecuted and convicted under the Combines Investigation Act or under the Code sections, the judge holding that conviction under the two Acts amounted to conviction for the same offence, and only one penalty might be imposed.³ The Famous Players Canadian Corporation was prosecuted under the Combines Investigation Act and under the Criminal Code, but in this case the defendants were found not guilty on both charges.⁴

The reports of Commissioners have in some instances been used to

¹ *Rex v. Simington*, (1926) 45 C.C.C. 249.

² *Rex v. Singer*, (1931) O.R. 202.

³ *Rex v. Alexander*, (1932) 2 O.L.R. 109.

⁴ *King v. Famous Players Canadian Corporation*, (1932) O.R. 307.

determine what new legislation is necessary.¹ Mr. Duncan, Commissioner to investigate the fruit and vegetable combine in Western Canada, was asked to draft a Bill to govern sales on consignment in order to eliminate the evils made evident in his report. The Bill, substantially as drafted by Mr. Duncan, is now the Sales on Consignment Act in British Columbia and in Saskatchewan.² Mr. Duncan, in his later report concerning the alleged combine in fruit and vegetables in Ontario, recommended legislation, though he found no combine to exist. His recommendation was considered by the Ontario Legislature, and the Fruit and Vegetables Consignment Act of 1927 was passed in accordance.³

The Combines Investigation Act of 1923 is still in force, and no subsequent legislation dealing with contracts or combinations in restraint of trade has been proposed. The machinery of the Act, if properly enforced, presents no difficulty other than the inescapable one of obtaining evidence in spite of the efforts of offenders to prevent it. Even in this it has been vastly more successful than any other Canadian Act. The definition of an offence under the Act is sufficiently broad to cover all acts which operate to the detriment of the public. Should cases occur in which the provisions of the Act are not sufficient, the expressed policy of the administrators of the Act is to promote suitable legislation.

APPENDIX 1A.

516. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

517. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the next preceding section.

520. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if a corporation is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully :

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce ; or

(b) to restrain or injure trade or commerce in relation to any such article or commodity ; or

¹ The Minister of Labour, addressing the House of Commons, June 7, 1926, said : " If the law as it stands is sufficient to deal with this question (referring to the fruit and vegetable combine in Western Canada), resort will be had to it should there be any disregard of its provisions. If the law as it stands is not sufficient, such appropriate legislation within the legislative competence of the Dominion will be introduced as may be necessary to give effect to this decision." (*The Labour Gazette*, for June, 1926.)

² Revised Statutes of Saskatchewan, 1930, c. 238. Statutes of British Columbia, 1926-7, c. 61.

³ Revised Statutes of Ontario, 1927, c. 270.

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof ; or

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

APPENDIX 1B.

CANADIAN CRIMINAL CODE, 1906, ss. 496, 497 and 498.

496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars, and not less than two hundred dollars, or two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company :

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be the subject of trade or commerce ; or

(b) to restrain or injure trade or commerce in relation to any such article or commodity ; or

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof ; or

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

APPENDIX 2.

THE COMBINES INVESTIGATION ACT OF 1923.

The content of the Combines Investigation Act of 1923, R.S.C., 1927, vol. i, p. 393, as summarized by Lord Atkin in the case of *The Proprietary Articles Trade Association v. Attorney-General for Canada*, (1931) 2 D.L.R. 1.

"Combines" are combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others," and which "are mergers, trusts, or monopolies, so called," or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transportation, or of fixing a common price, or enhancing the price of articles, or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce."

By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a Registrar of the Combines Investigation Act. The Registrar is charged with the duty to inquire whether a combine exists, whenever application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the Registrar and a Commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they shall be public. The Registrar is to report the result of any inquiry to the Minister, and every Commissioner is to report to the Registrar. Any report of a Commissioner is to be made public unless the Commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity.

By s. 32 : " Everyone is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years' imprisonment or, if a corporation, to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act.

" (2) No prosecution for any offence under this section shall be commenced, otherwise than at the instance of the Solicitor-General of Canada or the Attorney-General of a Province."

By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction, and appropriate penalties are imposed.

Under a group of sections, 29 to 31, entitled *Remedies*, powers are given as in previous Acts for the Governor in Council to reduce Customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price, of any article. Power is given to the Minister to remit to the Attorney-General of any Province the returns made in pursuance of the Act or any report of the Registrar, or any Commissioner, and if no action is taken thereon by the Attorney-General of the Province, the Solicitor-General, representing the Dominion, may take appropriate action.

(To be continued.)

TAXATION OF CHAIN RETAILERS IN THE UNITED STATES.

[Contributed by FREDERICK K. HARDY, ESQ., Associate Professor of
Marketing, Texas University.]

Growth of Retail Chains.—The chain store, or multiple shop, has arisen in the United States almost entirely within one generation.

GROWTH OF RETAIL CHAINS.¹

Year.	Number of Chains.	Number of Chain Stores.
1900	700	4,500
1910	3,000	13,500
1920	9,400	49,200
1928	20,000	119,600

The first United States census of distribution, in 1930, showed that slightly more than one-fifth of all retail sales in the United States was made by chain stores. The second census of distribution, in 1933, a recovery relief project, showed the chain-store share of total sales had increased in the depression to one-quarter of the total.² In 1934, the chain-store trade journal³ estimated that chain stores made one-third of the total of retail sales. In short, chain retailers are important in the United States, and that importance is increasing.

How far and how fast may this upward trend of chain retailing be expected to rise in the future? That is a matter of opinion, and my personal opinion is that the period of most rapid expansion of chain retailing is past. Several considerations point to that conclusion. First, it may be noted that, as the chain store grows from adolescence into maturity, it walks in the footsteps of the department store which in 1890 was popularly expected to engulf all retail trade. But department-store costs of doing business have increased and department-store net profits have decreased until, as a result, the number of department stores declined nearly 40 per cent. from 1929 to 1933.⁴ The number of chain stores decreased only four and three-tenths of 1 per cent. during that greatest depression in history. Yet, over a long period, chain-store costs are rising and chain-store net profits are dwindling, so it may reasonably

¹ U.S. Senate Document 100, 72nd Congress, 1st Session, p. xiii.

² U.S. Bureau of the Census, Census of Distribution, *Retail Chains* (1933), p. 14. *Chain Store Age*, January 1935, p. 71.

⁴ U.S. Census of Retail Distribution, vol. 1, p. 27 (1933).

be concluded that chain stores, like department stores, have passed their period of most vigorous growth.

As a second factor, limiting the growth of chain retailing, the internal operating problems of chain stores may be considered. Each chain store bears on its back a burden of overhead expense incurred by a high-salaried headquarters staff, which a competing independent store need not bear. It follows, therefore, that a really able independent merchant can compete advantageously with a chain store. On the other hand, it follows that small independent stores could flourish in a trade area so sparse that it would not support a chain store with its burden of supervision overhead expense. The exceptionally able merchant and the small retailer serving a sparse trade area are above chain competition, on the one hand, and beyond it, on the other.

The third factor which may limit the future growth of chain stores is the comparative lack of success of the chains in lines of business other than a very few. Chains seem to succeed in grocery and meat stores, grocery stores, limited-price variety stores, tobacco stores, shoe stores, drug stores and dry goods and apparel stores.¹ They do not seem to succeed in other lines of business, of a high-priced speciality and service nature. In fact, chain grocery stores are as numerous as all other chain stores put together.

The voluntary co-operative associations of independent retail grocers also have grown until they comprise about a third of the retail grocery business. The largest, the Independent Grocers Alliance, commonly called the I.G.A., boasts of more retailers' outlets than the Great Atlantic and Pacific Tea Co., the largest corporate chain.

A buying pool has recently been formed by a group of large chain-grocery corporations which controls a purchasing power greater than that of either A. & P. or I.G.A. Only about a third of the grocery business remains in the hands of small or unaffiliated concerns, and that minor share is diminishing.

The integration and affiliation of the majority of the merchants of food has profound social implications.

Anti-Chain Agitation.—Let us consider the situation, in Wisconsin for example, more in detail. Anti-chain prejudice and vigorous anti-chain agitation arose as early as 1921, and reached its peak in 1929 with regular anti-chain radio broadcasts and regular publication of anti-chain news-weeklies (some of them extremely scurrilous), supported by independent merchants' associations and wholesalers who had suffered from chain competition. Chain stores were picketed and chain managers were socially ostracized. This has now almost entirely died down.

Among other verbal brickbats, it was charged that chain stores, even though larger, paid less taxes than other merchants. On February 11, 1931, therefore, Wisconsin's Governor, Philip La Follette, requested Tax Commissioner Harold M. Groves to determine whether actual discrimi-

¹ U.S. Senate Document 100, 72nd Session, p. 13.

nation existed. A tentative preliminary survey was directed by a group of University Professors, temporarily serving the State.¹ In March 1931 a preliminary report to the Governor indicated that substantial tax-assessment discrimination existed between chain and independent merchants.

In partial summary the report indicated as follows : ²

SUMMARY OF ASSESSMENT DISCRIMINATION FOUND TO FAVOUR CHAIN STORES IN WISCONSIN IN 1931.

Type of Business	Ratio of Assessed to Book Value ³		Number of Stores surveyed	
	Chain Stores	Other Stores	Chain Stores	Other Stores
	Per cent.	Per cent.		
Groceries	58.72 ⁴	83.82	35	53
Dry Goods	64.74	80.36	12	18
Drugs	51.84	76.09	3	4
Furniture	41.66	79.19	4	7

This sample group of stores was too small for the results to be scientifically conclusive, but it was carefully selected from large, medium-sized and small communities in different parts of the State. Such evidence as was presented, pointed so overwhelmingly in the one direction that it indicated strongly that assessments discriminated very considerably in favour of chain stores.⁵

Tax Discrimination between Chain and Independent Merchants.—

How could tax assessment favour chain stores? Certainly local assessors did not intend to favour chains. In fact, if any personal prejudice entered into making the assessment, it would probably favour the local home-owned enterprise. Dr. Roy Blough, then statistician to the State Tax Commission, investigated and discovered that three separate discriminations in assessing merchants' inventories combined to favour retail chains.

First, local assessors cannot check up on the accounting records of the larger chains, because the accounting records of the larger chains may be in a distant city. The retail inventory method of accounting, which charges merchandise to the store manager at sales price, rather than at cost, is customary in large chains. As a result, accounting records used to check up independent merchants' assessments are not available to

¹ Dr. Harold M. Groves, Dr. Roy Blough and Dr. Leonard Krueger.

² Partial summary of an unpublished report of the Wisconsin State Tax Commission.

³ The average ratio of assessed to true value is officially recognized by the Commission to be 80 per cent. of the true cost value according to the book or accounting records, though the law requires it to be 100 per cent.

⁴ Chain assessments were well below Independents assessments, even though based on a cost which would be lower for the chains than for independents. It follows that, if the same tax rates were applied to all, the chains would pay less than their share.

⁵ 9 *Wisconsin Law Review*, 385.

check chains' assessments. Moreover, through the co-operation of the State Tax Commission, the inventory declared as a deduction for State income-tax purposes is made available to local assessors to check assessments of local merchants. Chain inventories, however, cannot be checked against income-tax returns because a chains' income-tax return lumps together all its operations within the State, while a local assessor is interested in only his own small fraction of the State.

Wisconsin Statute 70.34 provides that personalty, including merchants' inventories, shall be assessed at true cash value, which has been construed by the courts to mean the fair market value of a stock of goods sold in its entirety. However, since inventories are seldom sold in entirety at one sale without the inclusion of fixtures, goodwill, etc., the State Tax Commission has based assessments for many years upon cost figures derived from a merchant's accounting records. All merchants were treated alike, yet substantial discrimination resulted.¹

For example, the largest retail chain operating in Wisconsin, the Standard Oil Company, could buy mid-continent gasoline in the oil-fields, pipe it to Whiting, Indiana, ship it by whale-back lake steamer, and set it down in Wisconsin at a cost of about $5\frac{1}{2}$ cents per gallon. But the wholesale price of the same gasoline to competing retailers was about 10 cents per gallon, and some retailers reported cost for assessment on the same gasoline as high as 18 cents per gallon.

Second, chains usually bought direct from manufacturers at a lower price than was paid for similar goods at a similar stage of distribution in other stores who paid the price charged by wholesalers. The larger the chain, the larger was the share of merchandise bought direct from the manufacturer. Moreover, the larger the chain, the greater were the discounts and allowances for quantity purchases, for cash payments and for promotional display of the product. Furthermore, it is the usual accounting practice of chain stores to charge the expenses of purchasing and warehousing, which might have approximated the wholesalers' mark-up, into overhead rather than into costs of merchandise.

The chain store is largely an urban problem. Urban business personalty is immensely diverse, complicated by brands and trade-marks, without any general market, but rather with many special markets. Assessment of urban personalty by view would require an army of highly skilled assessors. Actually, only about 1,800 local assessors, working at a low salary, and most of them on a part-time basis, are scattered over the State. Hence, a blank form is mailed to persons thought to have personalty. There is no legal duty upon the tax-payer to report, nor any penalty for failure to report, yet he is asked to report the last physical inventory taken, plus and minus book adjustments to bring the inventory up to May 1. This statement, sworn before a notary public, is returned to the assessor by mail.

For small local merchants, self-assessment by mail works very well,

¹ XIX, *Bulletin of the National Tax Association*, 67.

for it is possible for the local assessor to check returns. Upon chain retailers' self-assessment, however, the local assessor cannot check up.

Third, chain stores have relatively little inventory on hand at any one time—their sales are large, but their inventory is small and frequently replenished. It is impossible for other merchants to increase their merchandise turnover to the high rate of a large well-managed chain, because of the local chain warehouse and its fleet of trucks, combined with the chain policy of selection of fast-selling items and elimination of slow merchandise.

All of these chain practices and policies are carried on for purposes of efficiency in operation and not for the purpose of escaping taxation, yet the result is a very considerable escape from any tax based upon inventory at cost.

On April 4, 1932, therefore, Dr. Harold M. Groves, the Tax Commissioner, since Tax Advisor to the Federal Government, and now State Senator, advised Governor La Follette, "An improved license tax could be worked out.....involving rates high enough at least to make up the tax differential between chains and independents.....to take account of the amount of chaining.....and to take account of the rate of turnover."

From its inception, therefore, Wisconsin's Chain Store Tax was not an attempt to discriminate against chain stores. On the contrary, it was an attempt to remedy previous discrimination in favour of chain stores.

As chains increased in size, so also did those policies and practices increase which resulted in escape from taxation. For this reason, the chain-store tax rates were made moderately progressive. On the other hand, some chains, dealing in lumber, furniture, garden tools, etc., were previously overtaxed because their inventories were always large on assessment day, May 1. It is permitted, therefore, to pay the chain-store tax with personal-property tax receipts, so the new tax burdens no one who did not previously escape.¹

¹ Wisconsin Law of 1935, Chapter 545, has revised its chain-store tax.

THE SCANDINAVIAN CONVENTION ON BANKRUPTCY AND ARRANGEMENTS OUTSIDE BANKRUPTCY.

[Contributed by MR. HENNING HOLM-NIELSEN, *Copenhagen.*]

The Background.—The movement for unity in Scandinavia, a movement parallel to the German and Italian movements of the nineteenth century, has not indeed brought about the political unity of the Northern States.

Yet the unity movement has achieved, in many important respects, the same practical results as a political union, and more particularly is this the case in legal matters. Since 1870 a considerable degree of uniformity has been established, by indefatigable endeavours, to such an extent that it may now be said that the Scandinavian citizen, be he a Dane, Icclander, Norwegian or Swede, will be born, live and die according to the same law.

This unification of law is particularly marked in the Civil law. It began in the domain of commercial law by the unification of the law of Bills of Exchange in 1880.

Yet this unification cannot alter the fact that the Scandinavian states are *de jure* independent states, each with its own public law, its own citizens, its civic rights and duties applying only to these citizens. It has therefore proved necessary to supplement the law by various conventions, in order that the citizens of each of these states may obtain, in the other states, the same rights as the citizens of those states.

Scandinavian Convention.—Among these conventions, the Scandinavian Convention on Bankruptcy and Arrangement (*concordat préventif*) is of special interest also to foreign countries, since endeavours have again and again been made at international conferences to establish some generally approved draft of an international bankruptcy convention—hitherto, however, without much practical result.

In the North, however, a common draft has been agreed and signed by the representatives of the governments of Denmark, Finland, Iceland, Norway and Sweden at a conference in Copenhagen on November 7, 1933, and was ratified by all the contracting parties during 1934. It has been in force since January 1, 1935.

The Convention is of great interest to other states as showing (1) which points may be regulated by an international convention on bankruptcy and arrangement, (2) which solution is practically realizable on each of these points.

The provisions of the Convention, including the schedules attached regulating (for Denmark) the effects of a Danish bankruptcy or arrangement in Finland, Iceland, Norway and Sweden respectively, and of a Finnish, Icelandic, Norwegian or Swedish bankruptcy or arrangement in Denmark, are very detailed. In this article only the main features can be mentioned.

A. The Convention does not apply in cases where the bankruptcy order was based on the fact that the debtor had absented himself from the state, or keeps himself hidden, for reason of his debt (Convention Art. 13, Sched. 250, § 14 ; Sched. 251, § 13).

B. According to Art. 11, Sched. 250, § 12, Sched. 251, § 11, the Convention did not apply to insolvent estates of deceased persons, but pursuant to Scheds. 271 and 272 of October 4, 1935, the Convention has been extended to such cases.

C. A bankruptcy declared in any one of the five states will generally apply to the assets of the debtor in the other states (Art. 1, sec. 1, Scheds. 250-251, § 1, sec. 1). For exceptions see below.

D. In general, the law of the country where the bankruptcy was declared (*lex fori*) is made applicable to the bankruptcy.

Thus the law of that country applies (in so far as the Convention does not provide otherwise) to the limitations in the debtor's right of dealing with his property; to determine what property is divisible among creditors; to the avoidance of settlements, etc. ; to the rights and duties of the bankrupt during the bankruptcy ; to the bankruptcy administration generally ; to the right of creditors and others to be paid out of the assets ; to the distribution of property; to a composition or scheme after receiving order or adjudication ; to the release of trustee and any other closure of bankruptcy proceedings. See Art. 1, sec. 2, Scheds. 250 and 251, § 1, sec. 2.

E. There are, however, important exceptions to the *lex fori* principle :

Property divisible among Creditors.—1. Any assets which, according to the law of the state of situation, are exempted from seizure by creditors, are not divisible among the bankrupt's creditors, even though they may be seizable according to the law of the state where the bankruptcy is declared (Art. 1, sec. 3, Scheds. 250-251, § 1, sec. 3).

2. Registration of title to land, real property, bills of sale, etc. (Arts. 4-5, Sched. 250, §§ 4-6 ; Sched. 251, §§ 3-4).

The question whether public registration of title to land and real property is necessary, in order that sales and contracts made *before* the bankruptcy by the debtor as to land and real property shall be valid in his bankruptcy, as well as the possible avoidance of such sales, etc., is ruled by the law of the state where the real property is situate and not by the law of the state where the bankruptcy is declared.

So, too, the question whether the bankruptcy shall be registered in order to invalidate the debtor's sales, etc., as to real property during the bankruptcy.

As to ships and aeroplanes, the same two questions are settled in the same way : according to the law of the domicile of the ship or aeroplane, and as to bills of sale according to the law of the state where the property is situate.

3. The effect of the bankruptcy on execution is governed by the law of the state where the execution took place (Art. 4, sec. 3, Sched. 250, § 6 ; Sched. 251, § 5).

4. The realization of property is governed by the law of the state where the property is situate (Art. 6, Sched. 250, § 8 ; Sched. 251, § 7).

5. The question whether a secured creditor may realize or otherwise deal with his security notwithstanding the bankruptcy is governed by the law of the state where the security is situate (Art. 5, sec. 1, Sched. 250, § 7 ; Sched. 251, § 6). Whether a secured creditor is in any case entitled to preferential payment out of the security is also ruled by the law of the state where the security is situate (Art. 7, sec. 1, Sched. 250, § 9 ; Sched. 251, § 8).

6. The Convention leaves undecided certain questions as to priority of debts. It states that the priority of taxes and other public imposts is governed by the law of the state where they are imposed, and the priority of rent by the law of the state where the real property is situate (Art. 7, sec. 2, Sched. 250, § 9, sec. 2 ; Sched. 251, § 8, sec. 2).

7. The Convention does not state a rule as to disclaimer of contracts (Art. 9, Sched. 250, § 11 ; Sched. 251, § 10).

8. Assets which are outstanding debts. Such assets are presumed to be in the state where the bankruptcy has been declared. But if any outstanding debt is stated in a bond or another document, it is presumed to be in the state where the bond, etc., is (Art. 8, sec. 1, Sched. 250, § 10 ; Sched. 251, § 9).

Bankruptcy Administration.—1. The trustee shall, if the bankruptcy comprise any property in any of the other states, take steps to secure the publication of the bankruptcy order in such other state, and its registration, according to the law thereof (Art. 2, sec. 1, Sched. 250, § 2, sec. 1).

2. Special notice of the bankruptcy order is to be sent to all known creditors in the other states, unless the debt is acknowledged without proof by the creditor. In the same way creditors in the other countries are to be given notice if their debts are contested (Art. 2, sec. 2, Sched. 250, § 2, sec. 2).

3. The trustee may claim the assistance of the officials in the other countries as to any property there situate, to the same extent as a native trustee in those countries. In particular, the bankruptcy courts of those countries are to be assistant to the trustee, if he claims a statement of the property, the seizure of property or the realization of any property which may not expediently be kept. The request may be made directly to the official or court in question (Art. 3, Sched. 250, § 3 ; Sched. 251, § 2).

The Convention also applies to the winding up of insolvent banks in so far as the winding up does exclude bankruptcy, according to the law

of the state where the bank is domiciled (Art. 12, sec. 1, Sched. 250, § 13 ; Sched. 251, § 12).

Proceedings for an Arrangement for Prevention of Bankruptcy (*concordat préventif*) instituted in any of the five states exclude the institution of proceedings in bankruptcy or in arrangement in the other states. The bankruptcy and arrangement proceedings also exclude seizure of property by execution in the other states to the same extent as proceedings in bankruptcy, etc., instituted in any of those states themselves exclude seizure (Art. 15, sec. 1, Sched. 250, § 16, sec. 1 ; Sched. 251, § 15, sec. 5).

If the arrangement is confirmed by the court, it will be valid also in the other states (Art. 15, sec. 2, Sched. 250, § 16, sec. 2 ; Sched. 251, § 15, sec. 2).

The Future.—The working of this Convention is much facilitated by the fact that the laws of bankruptcy and arrangements to prevent bankruptcy (*concordat préventif*) in Scandinavian states are very similar. It is to be hoped that the states will before long achieve complete unity of law in bankruptcy and arrangement. In this connexion the committee appointed in 1930 by the Ministry of Justice for the revision of the Danish insolvency law has a great task.

THE GOLD CLAUSE IN INTERNATIONAL LOANS.

[Contributed by DR. JUR. M. SCHMITTHOFF, LL.M., of *Gray's Inn*.]

It is usual to insert in international loans a clause which makes the redemption of the loan dependent on the value of gold. The reason for embodying the Gold Clause in international contracts is to afford the creditor some protection against the loss of the intrinsic value of the money which he had handed over to the debtor. It is obvious that the Gold Clause is of particular importance in international loans where there are two sets of facts which commonly import the gravest danger for the investor, namely, that of the debtor being resident in another country and subject to different economic and political conditions, and, secondly, the fact that the obligation is in the nature of a long-term loan, exposed to the possibility of depreciation of currency.

The object of this article is to examine the different forms of the Gold Clause and to consider the rules of Private International Law applicable to the Gold Clause in International Loans.

Different Forms of the Gold Clause.—It is usually said that there are three types of the Gold Clause. Under the Gold Clause proper (the Gold Commodity Clause) the creditor is entitled to ask for a certain quantity of gold expressed in weight. The Gold Coin Clause entitles the bondholder to recover gold coins of a certain State, and to reject any other form of discharge (unless the State has, by legal tender Acts, compelled him to accept other means of discharge). In case of the Gold Value Clause, the parties distinguish between the substance of the debt and the currency of discharge. The clause contains different provisions for both aspects of the obligation. With regard to the substance of the debt, it provides a fixed measure of gold as the most stable metal in the world, and it is irrelevant whether this measure has been fixed on the footing of the weight of fine gold or by reference to a number of gold coins which according to the Coinage Acts must contain a prescribed portion of pure gold. With regard to the currency of discharge the Gold Value Clause provides that performance has to be made in a certain currency, or sometimes in several currencies according to the option of the bondholder. Whilst the substance of the debt is thus rendered stable, the currency of exchange which is necessary to buy this fixed amount of gold may fluctuate, according to the rate of exchange of the currency. The substance of the debt is thereby made independent of all possible fluctuations of the currency of discharge, and particularly

from depreciation. Under this type of the Gold Clause, the bondholder will recover the same amount of purchasing power which he had lent to his debtor. The Gold Clause proper is a commodity obligation, the Gold Coin Clause is in the nature of a specie debt and the Gold Value Clause does not divest the obligation of the character of a money debt, but the amount of money necessary to redeem it is not fixed from the beginning, as is done in a simple money debt.

These distinctions between the Gold Clause proper, the Gold Coin Clause and the Gold Value Clause are easy to draw in theory, but it is difficult to apply these rules in practice. At present, there is no uniformity in the wording of the single types, and the courts have not yet associated a definite meaning to the different forms. Moreover, the language employed contains an almost unavoidable element of ambiguity. The Gold Value Clause must necessarily refer to some customary measure of gold, either to weight or to mint, and this form is thereby bound to embody expressions which, at the first view, appear to point to the commodity or coin type. Hence the words of the Gold Clause do not afford much assistance, and the only way to ascertain which type of the clause is at issue is to scrutinize the intention of the parties and the surrounding circumstances in the manner laid down by Lord Russell in *Feist v. Société Intercommunale Belge d'Electricité*.¹

(1) In accordance with the rule of construction there laid down, even in case of the bond stating that a fixed amount of gold is deposited and may be claimed by the bondholder, there is a strong presumption against the debtor having promised to deliver gold as a commodity. This would be contrary to the character of the transaction as a loan which always has to be returned in money; it would change the transaction into a long-term purchase of gold in a way contrary to all mercantile custom with regard to international issues. Thus, the Government of the United States issued in 1928 a series of Gold Certificates. The face value of these certificates was expressed in dollars, and the certificates provided that, in compliance with the relevant Acts of Congress, there had been deposited in the Treasury of the United States the face value in gold coins which would be paid to the claimant, as holder, upon demand. The Supreme Court of the United States held, in *Nortz v. The United States*,² that these Gold Certificates were not to be construed as warehouse receipts for gold. "They were not contracts for a certain quantity of gold as a commodity. They called for dollars not bullion."

(2) International bonds often contain a clause providing that the loan has to be redeemed in "gold coins of the X State of the present (i.e. existing at the day of the issue) weight and fineness." Here again the words may convey a fallacious impression, and resort must be had to the rule of interpretation of the Gold Clause laid down in the *Feist* case. It is submitted that the following method of approaching the

¹ [1934] A.C. 161.

² 294 U.S. 317.

intention of the parties covers most of the cases in question: In the first instance, we must examine whether, at the time of the issue, the system of currency referred to was the only currency of the country or whether another currency existed in addition to it. When two (or more) currencies were circulating, the creditor may have intended to stipulate that the loan should be redeemed in specie. When, on the other hand, the currency named in the Gold Clause was the sole money, a strong presumption is given that the parties had not more in mind than choosing the minted gold as a measure for the substance of the debt. The outstanding example for the system of double currencies is furnished by the United States from 1862 to 1900. During this period two kinds of dollars were in circulation—the “hard money” which had been in existence before the Civil War, and the “greenbacks,” bank-notes which had been made inconvertible by the Legal Tender Act of February 25, 1862. The hard money was, of course, much more valued than the greenbacks. The Supreme Court of the United States had already decided in *Bronson v. Rodes*¹ that a contract to pay a certain number of dollars in gold and silver coins could not be discharged by payment in greenbacks, and the court in *Trebilcock v. Wilson*² extended this view to a contract where the stipulation was merely for payment of dollars “in specie,” stating that this meant, according to the general usage, payment in hard money. The court said with regard to the system of double currencies:

The several Coinage Acts of Congress make gold and silver a legal tender in all payments, according to their nominal or declared values. The provisions of the Act of January 18, 1837, and of March 3, 1849, in this respect were in force when the Act of February 25, 1862, was passed, and still remain in force. As the Act of 1862 declares that the notes of the United States shall be lawful money and a legal tender in payment of debts, and this Act has been sustained, by the recent decision of this court, as valid and constitutional, we have according to that decision two kinds of money essentially different in their nature, but equally lawful. . . . The Act of 1862 itself distinguishes between the two kinds of dollars in providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. . . . The contemporaneous and subsequent legislation of Congress has distinguished between the two kinds of dollar. . . .

Another modern case where the system of double currencies was at issue was *Lindsay Gracie & Co. v. Russian Bank for Foreign Trade*.³ Here Bailache J., at a time when the governmental form of Russia was uncertain, said:

There are current notes issued by the Imperial Government, by the Provisional Government and by the Bolsheviks. The only question is, what at the present time is Russian currency? Does it consist of any one of these issues, or of Imperial notes exclusively, or of Imperial notes and notes issued by the Provisional Government? . . . Another [*i.e.* witness]

¹ (1868) 7 Wallace 229. ² (1871) 12 Wallace 687. ³ (1918) W.N. 177.

said that Imperial notes and notes of Mr. Kerensky are both for the moment currency, and this is the conclusion I have come to.

These examples¹ indicate that under modern conditions double currencies are the outcome of some stage of emergency or transition. The interpretation of the Gold Coin Clause may, as already indicated, be quite different whether the coins belong to a system of double or uniform currency. Under the double system, there may be some reason for a party to insist on the token promised in the bond, since he in his turn may be bound to supply a third person with these coins in specie. In the case of a uniform system these special reasons no longer obtain, and the intention of the parties must have been the usual cause for inserting a Gold Clause into a contract, viz. the desire to protect the creditor against a subsequent depreciation. In this connexion, it ought not to be overlooked that it is the easiest and most appropriate way for the parties intending to put the substance of the debt on gold to refer to minted gold, since the State has by its Coinage Acts supplied a scale for translating gold into terms of money. This construction is in accordance with the decisions of the courts in many countries. In *Feist v. Société Intercommunale Belge d'Electricité*,² a Belgian company had issued bonds promising payment in gold coin of the United Kingdom of or equal to the weight and fineness existing on the date of the issue (September 1, 1928). The plaintiff claimed payment of such sum on the footing of gold. The defendant offered to redeem the loan in legal tender. Lord Russell, in his speech in the House of Lords which found the concurrence of all other members of the Court, pointed first to the difficulties offered by the wording of the clause :

I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. . . . But I prefer this to the only other alternatives, namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear.

Then the learned Lord referred to the judgments of the Permanent Court of International Justice sitting at The Hague, in the case of the *Serbian and Brazilian Loans*,³ and after having observed that these judgments were of course not binding upon an English court, he quoted with approval the following passage in the judgment on the *Serbian Loans* :

As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definite word " gold " cannot

¹ Other modern cases of double currencies were : the temporary co-existence of the Mark and the Rentenmark at the close of the German depreciation (Nussbaum, *Das Geld*, p. 51), and after the breaking up of the Austrian Empire the several types of the Krone (e.g. Austrian, Hungarian, Czechoslovakian crown) till the final regulation by the Succession States (Nussbaum, *loc. cit.*, 59).

² [1934] A.C. 161.

³ Publications of the Permanent Court, A, Nos. 20, 21.

be ignored, the question is: what must be deemed to be the significance of that expression? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But in so contracting, the parties were not content to use simply the word " franc," or to contract for payment in French francs, but stipulated for " gold francs." It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be not to construe but to destroy it.

The Supreme Court of the United States, in the so-called Gold Clause Cases, has interpreted the clause in the same manner. In *Norman v. The Baltimore and Ohio Railroad Company*,¹ the court held:

We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed.

In *Perry v. The United States*,² the court laid down:

The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment.

The Swedish Royal Court of Appeal, in a judgment in *Skandia Insurance Company Ltd. v. The Swedish National Debt Office*,³ has said:

By the so-called gold clause contained in the bonds it was obviously intended to give the buyers of the bonds a guarantee during financially insecure times for the value of the loan in gold, or, in other words, to create for them a right, in case of redemption in paper currency, to receive as much more in paper currency as would on the day of payment be equal to the fall in value of the paper currency as compared with gold coin. The said clause cannot, therefore, be viewed solely as a stipulation of a purely monetary nature but must be considered as also referring to the substance of the debt.

The Dutch District Court of Amsterdam, in *S. G. Appeldoorn v. The German Company Osram Ges.m.b.H. Kommanditges*,⁴ has said:

Whereas the parties clearly and expressly intended to render the obligation of the defendant independent of the contingencies of a currency, in other words, to ensure that the holder of the coupon should always receive the

¹ 294 U.S. 302.

² 294 U.S. 348.

³ *Bulletin de l'Institut Juridique International*, 1935, vol. xxxiii, p. 142.

⁴ *Bulletin*, 1935, vol. xxxiii, p. 115.

same value ; and whereas the parties therefore stipulated that the obligation of the defendant should be expressed not in " gold dollars," without further addition, but in " gold dollars of the present (December 2, 1925) standard of weight and fineness," agreeing thereby upon a definite unit of fine gold, the commodity which was the most stable in the free market.

The German Court of Appeal in Berlin (Kammergericht) decided in the case concerning the payment of the 7 per cent. Secured Gold Bonds of the Deutscher Sparkassen- und Giroverband :¹

Regard must, therefore, be paid to the importance customarily attributed to such clauses in international relations. From this point of view it must be assumed that the clause was devised with the intention to protect the bondholders from the results of any depreciation of the American currency, even though such depreciation was considered as highly improbable at the time of the issue of the bond.

The Belgian Civil Court of Antwerp had, in *A. Peten v. City of Antwerp*,² to construe the gold clause, and held :

Considering that the reference to a certain quantity of gold can only in fact have been made with the object of securing the contracting parties against a depreciation of the currency ; that the effect of the gold clause is to deprive the debtor of the possibility of making a profit by discharging his debt in depreciated money ;³ that by inserting in a contract of loan a clause providing for repayment in gold, the parties wished to ensure that the creditor would in fact receive back the value of the sum he disbursed and to protect him from fluctuations of exchange.⁴

(3) The position with regard to the Gold Value Clause is that the courts have not yet developed a method of approach peculiar to this type. It has been held in a number of cases that according to the intention of the parties the reference to gold coins must be interpreted as importing the measurement clause.

It cannot be doubted that the courts, in construing the Gold Clause in almost all cases as a measurement clause, have met the intention and desire of the parties inserting the clause in their agreement. To interpret the clause in another way would, indeed, mean " not to construe but to destroy it." It would imply that the bondholder had intended to expose himself expressly to all future enactments which the State may devise with regard to bullion or mint. Legislation of this type has always been of a discretionary character by reason of its being dependent on economic occurrences. On the other hand, municipal law is usually reluctant to legislate with regard to the substance of the debt. As the law does not, as a rule, interfere with the amount of the purchase price, it does not take notice of a debt being discharged by payment of more or less money, as long as payment is made in legal tender.

¹ A. Plesch, *The Gold Clause* (*op. cit.*), p. 101.

² A. Plesch (*op. cit.*), p. 108.

³ D.P. 1930, ii, 47 ; note de Decencière Ferrandière.

⁴ Cass. Fr. 23, Jan. 1924, D.P. 1924, i, 41.

For these reasons, there is a strong presumption that the Gold Clause is always in the nature of a Gold Value Clause, this presumption being rebuttable only if a particular intention of the parties is apparent, as in the cases of double currency. It should, however, be noticed that the authorities arrive at this result by way of different reasoning. The English as well as the American courts take the wording of the clause as the starting-point and consider it their task to find the true construction of the clause.¹ Continental courts and writers are at times inclined to disregard the wording altogether and to ascertain what the parties would have stipulated had they been faced with the problem at the moment of the conclusion of the contract.² This would amount rather to the court concluding a contract for the parties than interpreting an agreement.

It follows from these observations that the Value Clause is the only type of the Gold Clause which affords the bondholder the intended protection. We propose, therefore, to confine ourselves to this form of the Gold Clause.

The Law Applicable to the Gold Value Clause in International Loans.

—It has been shown that the Gold Value Clause consists of two parts, one fixing the substance of the debt on the footing of gold, and the other providing for the fluctuating currency of discharge. Consequently, the question of the law applicable resolves itself into two parts: which is the proper law of the substance, and which that of the medium of payment?

It is a recognized rule of Private International Law that different parts of a contract may be governed by different statutes. Thus, Bowen L.J., in *Jacobs v. Crédit Lyonnais*,³ was careful to ascertain whether some law other than the English is to govern "the construction of any portion of the contract as regards the liabilities of the contracting parties." The Permanent Court, in the judgment on the *Serbian Loans*,⁴ makes the following observations on the "split":

Again it should be observed that even apart from public policy it is quite possible that the same law may not govern all aspects of the obligation. The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods of the payment thereof.

Professor Dicey in his *Conflict of Laws*,⁵ Professor Sauser-Hall in his Opinion on the Gold Clause in the Swedish Governmental Loan⁶ and Professor de Visscher in his Opinion on the Gold Clause in the

¹ See the above-mentioned cases, and further the speech of Hilbery J. in *British & French Trust Corp. Ltd. v. New Brunswick Railway Cy.*; 1 All Eng. L.R. 13.

² See Best in *Bank-Archiv*, 1935, vol. 35, at p. 98.

³ (1884) 12 Q.B.D. 602.

⁴ Publications of the Perm. Court, A, Nos. 20/21.

⁵ 5th ed., p. 675, fn. i.

⁶ Flesch, *op. cit.*, p. 75.

Loan of the City of Antwerp¹ are of the same opinion. The following possibilities may now be considered:

(1) With regard to the currency of exchange, the law of performance has been made applicable by express stipulation of the parties.

Here the difference between an obligation protected by a Gold Value Clause and a simple debt of foreign currency is clearly to be seen. In the former case, a subsequent depreciation would affect only the mode of performance but would not change the substance of the debt, and no harm would ensue to the creditor. In case of a mere foreign currency obligation, a subsequent depreciation would decrease the substance of the debt too, and this would damage or even destroy the creditor's right. This is the result of the English authorities, *British Bank for Foreign Trade v. Russian Commercial & Industrial Bank*,² *In re Chesterman's Trust*³ and *Anderson v. Equitable Life Assurance Society*.⁴ The American case, *Deutsche Bank Filiale Nürnberg v. Ch. F. Humphrey*,⁵ arrives at the same result.

That the currency of discharge is by express stipulation submitted to a particular municipal law does not permit of the conclusion that the same law should apply also to the substance of the debt. This would be contrary to the declared intention of the parties to make independent the substance of the currency of discharge. The opposite construction would amount to treating the obligation as a mere foreign currency debt, and thereby to destroy and not to interpret the Gold Clause.

(2) With regard to the substance of the debt, the parties may expressly subject this portion of the debt to a particular law.⁶ This law would, of course, govern the essence of the debt.⁷

The greater number of international issues do not expressly provide for the law applicable to the substance of the debt. In these cases, the general rules of Private International Law must be consulted to discover the proper law.

Whilst up to this point no divergency existed between the English and the continental view, the following observations will reveal that the two doctrines, to a certain extent, approach the problem from a different angle without differing materially in the results.

¹ Plesch, *op. cit.*, p. 113.

² (1921) 38 T.L.R. 65.

³ [1923] 2 Ch. 466.

⁴ (1926) 134 L.T. 557.

⁵ (1926) 272 U.S. 517.

⁶ This was the case in *A. Peten v. City of Antwerp* (Plesch, *op. cit.*, p. 106). Here the following words appeared in the bond: "This bond shall for all purposes be deemed to be a contract executed and to be performed within the State of New York, United States of America, and shall be construed in accordance with the laws of the said State."

⁷ The only legal problem which could arise in this case is whether the reference incorporates the law of the time of the engagement or the time of the loan becoming due. This question has been examined by Professor Sauser-Hall in his Opinion on the Loan of the Government of Sweden (Plesch, *op. cit.*, p. 85). He arrives at the conclusion that the proper law is the law as it was at the time of the engagement being entered.

(a) The English rules of Conflict of Laws do not consider the international loan as a particular contract governed by special rules, as in the case of the maritime contract which is subject to the presumption of the law of the Flag. The general principles which according to English law are applicable to international loans need not to be discussed here in full. We have to ascertain which is the "proper law" of the contract, and if there are no other indications the presumption of the *lex loci contractus* may be applied to those cases where the contract is to be performed at the same place where it is concluded, and the *lex solutionis* may be presumed in those cases where the contract shall be performed in another country than that of the engagement. In case of international loans, the place of conclusion of the contract will often be the place of the issue of the loan, though this may be otherwise if the loan has been concluded at the domicile of the debtor and has merely been placed by agents at the foreign market. The case where an international loan has been floated in different countries has, it appears, never come before English courts.

The conception of the "proper law of the contract" is a general formula of extreme elasticity. As Bowen L.J. said in *Jacobs v. Crédit Lyonnais*,¹ the proper law of the contract is the law which the parties have intended to apply to their contract. It should, however, not be overlooked that the intention of the parties is but one of the series of circumstances to be taken into account. Dicey, in his *Conflict of Laws*,² sums up the position of English law as follows :

A variety of circumstances must be considered, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties ; and English judges have consistently declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties.

English courts have, however, treated one species of the international loan in a particular way, namely the loan floated by a Sovereign. Here a strong presumption (rebuttable only in case of express stipulations to the contrary) exists that the Sovereign has submitted only to his municipal law and that the parties have contracted accordingly. In *International Trustee for the Protection of Bondholders Aktiengesellschaft v. The King*,³ Branson J. has stated the law as follows :

This contract, however, was not a contract between subjects but was one between a Sovereign and subjects, and it was contended that the ordinary criteria were inapplicable. The precise point had been dealt with by Lord Romilly in *Smith v. Weguelin*,⁴ and his words were cited with approval by Lord Selborne in *Goodwin v. Roberts*.⁵ Anyone accepting the promise of a Sovereign by way of contract must be aware that the promise could not be

¹ (1884) 12 Q.B.D. 589.

² At p. 666.

³ *Law Times*, 1935, vol. 180, pp. 341 and 455. Cf. 52 T.L.R. 82.

⁴ L.R. 8 Eq. at pp. 212-13.

⁵ 1 App. Cas., at p. 494.

enforced in any court of law unless the Sovereign submitted himself to the jurisdiction of some court, and the presumption that the Sovereign would not submit to any court but that of his own country was so strong that only an express stipulation to the contrary would avail to displace it.

(b) Continental writers consider the international loan as a particular contract subject to special rules of Private International Law. Von Bar,¹ Meili² and Frankenstein³ treat the international loan at length in separate chapters, and Meili subdivides his observations into "loans," "international obligations of Great Industrial Enterprises" and "State Loans and other State Obligations." The continental writers draw a distinction between the loans floated by a Sovereign and those floated by a private or public corporation. In the first case, it is the unanimous view of the continental school, which also has found expression in judicial decisions, that the proper law is that of the Sovereign. This was expressly laid down by the Permanent Court in the case of the *Serbian Loans*,⁴ by the Swedish Royal Court of Appeal⁵ in the case *Skandia Insurance Company Ltd. v. National Debt Office* and earlier by the French Civil Tribunal of the Seine in *Government d'Ottoman v. Comptoir d'escompte*. As far as the loan floated by the Sovereign is in question, the English and the continental authorities are at one.

With regard to the loans issued by private or public corporations the continental writers discuss whether the law of the domicil of the debtor or the law of the issue (*lex emissionis*) or the law of performance is the proper law of the substance of the debt.

Much attention is paid to the fact that the bonds are negotiable instruments representing unilateral obligations of the debtor. Whilst the person of the debtor remains always the same, the creditors may change quickly, they may reside in different parts of the world, they may be of different nationality, they may be even anonymous as in the case of bearer bonds. Moreover, as a rule the debtor will charge his property and plant with a floating charge which can only be realized according to the law of his domicil. This is particularly so in the case of railway, canal or public utility enterprises. In other cases, the main business will be done in the country of the debtor. All these circumstances point strongly to the law of the domicil of the debtor as the proper law with regard to the essence of the obligation.

The law of the issue may be intended to be applicable where the circumstances reveal a clear intention of the debtor to subject himself to it, *e.g.* where securities have been deposited at the place of the issue,

¹ Von Bar, *Theorie und Praxis des Internationalen Privatrechts*, 2nd ed., vol. ii, at p. 135.

² Meili, translated into English by Kuhn, *International Civil and Commercial Law*, 1905, New York, at p. 334.

³ Frankenstein, *Internationales Privatrecht*, vol. ii, at p. 352.

⁴ Publications of the Permanent Court, A, Nos. 20/21.

⁵ *Bulletin de l'Institut Juridique International*, 1935, vol. xxxiii, at p. 142.

⁶ 1875, Clunet, vol. iii, at p. 271.

or where the bonds comply with provisions peculiar to the regulations of the foreign stock exchange (*e.g.* arbitration clauses).

The law of performance is not favoured by the continental school, as far as international issues are in question. The Austrian courts have held, in the cases concerning the Coupons of the Loans issued by Austrian Railways,¹ that the law of the place of performance did not apply though the loans were made payable in foreign currency at paying agents residing at the foreign places. The German Supreme Court of the Reich, however, has taken the opposite view.²

Even in cases where no Gold Value Clause has been inserted into the bonds, the tendency is towards the recognition of the law of the domicile of the debtor as the predominant presumption peculiar to international loans.

(c) The difference between the English and the continental view is more apparent than real. In case of the loan floated by a Sovereign the two doctrines are at one. In case of loans of private or public corporations, it is submitted that the special circumstances which have induced the continental writers to establish a presumption in favour of the law of domicile of the debtor would, in appropriate cases, be acted upon by English courts, since the conception of the "proper law" is elastic enough to cover them. This view is affirmed by the Canadian case, *Harris Investments Ltd. v. Smith*.³ Here a trust deed securing the issue of bonds provided that land situate in British Columbia was mortgaged, but the trustee resided in Oregon. Macdonald C.J., after referring to *Jacobs v. Crédit Lyonnais*,⁴ held that the law of British Columbia and not that of Oregon was the proper law of the contract.

Conclusion.—The result of these observations may be summed up as follows :

(1) The Gold Value Clause is the only type of the Gold Clause which safeguards the bondholder against a subsequent depreciation of the debt. There is, in all cases of the Gold Clause, a strong presumption in favour of the Value Clause, rebuttable only under special circumstances.

(2) In case of a Gold Value Clause being inserted in the bond, the law applicable to the substance of the debt is to be ascertained as follows : If the loan has been floated by a Sovereign, the proper law with regard to the substance of the debt is the law of the Sovereign ; if the loan is issued by a private or public corporation, the circumstances will generally point to the law of the domicile of the debtor.

Note.—The subject has been recently illuminated in a valuable article by Mr. Wortley in the current volume of the *British Year Book of International Law*. Reference may further be made to the second volume of Plesch's work, of which a review will be found on a subsequent page. The decisions of the Supreme Courts of the Netherlands and of Germany therein referred to are of special importance and interest.

¹ Epstein, *Oberst Gerichtliche Entscheidungen in Eisenbahnsachen*, Wien, 1879, at p. 495.

² R.G.Z. 1, 23 and J.W. 1927, 2289.

³ (1934) 1 D.L.R. 748.

⁴ (1884) 12 Q.B.D. 589.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Dominions and the Royal Accession.—The death of the late King was received in the Dominions with sincere regret, which was fittingly expressed by messages of condolence from the governments and legislatures. The royal accession was duly proclaimed in all the Dominion capitals save Dublin, and the Parliament of the Irish Free State did not fail to send addresses of sympathy to Edward VIII and the royal family. The new status of the Dominions received formal recognition in the summoning of the High Commissioners in London to take part in the ceremonial at which the Lords of the Privy Council with other representatives of his people proclaim the new monarch.¹ Further it was provided in making arrangements for the coronation that Dominion representatives should be included on a Committee charged with the function of planning the ceremonial. One change, of course, has long been obvious. The King has been wont to swear to "govern the people of this United Kingdom of Great Britain and Ireland and the dominions thereunto belonging, according to the statutes in Parliament agreed on and the respective laws and customs of the same." This oath² was duly cited by supporters of the right of Parliament to legislate for the American colonies, nor in fact can it be doubted that it implies that the dominions are the possessions of the United Kingdom and subject to its legislation. A very slight alteration would suffice to make the King swear to govern the United Kingdom of Great Britain and Northern Ireland, the British dominions beyond the Seas, and India according to their respective laws and customs, thus evading any assertion of Parliamentary omnipotence. But, whatever the form adopted, the change is clearly due.³

The London Naval Treaty and the Dominions.—From the point of view of the maintenance of some appearance of imperial unity, the decision of the powers not to attempt to include quantitative limitation in the new London treaty was unquestionably satisfactory, for it avoided a definite difficulty due to the determination of the Irish Free State not to be classed as a unit of the British Commonwealth of Nations in calculating

¹ Keith, *The King and the Imperial Crown*, pp. 16–18.

² In the form provided for William III and Mary; Keith, *Constitutional History of the First British Empire*, pp. 141, 376.

³ The Irish Free State naturally declined membership of the Coronation Committee.

the total tonnage to be allowed to that power. In fact, the Free State, though duly represented by a plenipotentiary, finally decided to stand aside from the treaty achieved on the ground, in part at least, that it neither had, nor did it propose to create, a naval force, and, rather unexpectedly, the Union of South Africa took the same course. The position remains anomalous, for the British government is bound by the Anglo-German accord of 1935 and by the understanding with the United States reached at the time of the conclusion of the treaty of London to regard the ratios of tonnage accepted by these accords as applying to the whole of the tonnage of the Commonwealth. But no doubt for all practical purposes the matter is of no importance, for neither the Free State nor the Union obviously has any idea of naval construction. General Smuts indeed at one time considered the idea of thus taking a part in the scheme of Empire defence, but the cost involved, as well as the opposition in the ranks of the Afrikaans-speaking population, terminated any possibility of carrying that project into action.

The Egyptian Treaty.—The restoration of democratic government to Egypt has rendered possible the conclusion of an accord which places Anglo-Egyptian relations on the sure basis of a permanent alliance, resting on recognition of Egyptian sovereignty. From the point of view of the Empire the treaty marks the imposition on the United Kingdom alone of an obligation to aid Egypt in war. This, of course, is in accord with the precedent of the Iraq treaty, but the position is in substance very different. In the security of Egypt, Australia, New Zealand and India have the deepest interest, and it is curious that no provision is included permitting them to share the obligation, as was done in the case of the Locarno Pact. That the Empire should thus have to be treated differentially must be regretted, but the Convention regarding the Régime of the Straits of July 20, 1936, has removed one case of British obligation as opposed to that of the Dominions. Here again, however, the curious character of the Empire is seen in the fact that Australia alone was represented by a plenipotentiary. The new Convention further authorizes the immediate remilitarization of the zone of the Straits, without requiring the assent of the other powers which signed the treaty of 1923. The legal position is not exactly simple, but the necessity of releasing Turkey from restrictions no longer tenable was plain, and irregularity much preferable to acceptance of unilateral denunciation. Under the Egyptian treaty surrender of the capitulatory régime by Britain will bind the Dominions without their formal assent, but that follows from the fact that these privileges are enjoyed solely through the British government, and by Dominion citizens or nationals only qua British subjects. The treaty places British control in the Sudan in a most fortunate position with formal recognition of the paramount duty of considering the interests of the people of the Sudan. There is, however, given to Egypt an essential share in the exercise of sovereign rights in the provision that the application of treaties to the Sudan shall in future require joint action by

both Britain and Egypt. The provision that the courts shall have no power to deal with legislation alleged to run counter to the promise of non-discrimination against foreigners, when the new régime is in working, is undoubtedly wise. It will allow foreign states to take up any alleged contravention of the promise with the Egyptian government without having to seek redress from the courts, which would be naturally in a very difficult position in dealing with an issue, better suited for negotiation or arbitration *ex bono et aequo*.

The Maltese Constitution.—While the debacle in Ethiopia was undoubtedly instrumental in securing the Anglo-Egyptian accord, it revealed the necessity of the final destruction of the constitution of 1921 conferring limited responsible government on Malta. Responsible government can, it is clear, operate only where there is hearty acceptance of the British Crown and where clerical influence on voters is kept within reasonable bounds. Neither condition, as the recent history of the islands proves, is now existent in Malta, and the only logical step was to clear the way for a revival of full constitutional control by the Crown through the grant of unfettered power to repeal the Constitution of 1921. That an Act of Parliament was necessary for this purpose followed inevitably from the principle of *Campbell v. Hall*¹ which renders irrevocable the surrender of legislative authority to a representative legislature, save in so far as the power to legislate is reserved. The piecemeal efforts to accord powers to the Governor by alterations in the Letters Patent ratified by the Act of 1932² had still left it possible to contend that the Governor's legislation by Ordinance was invalid, and the Act³ has the merit of ending this controversy. Under the new Constitution⁴ the administration can proceed, not without consultation of the wishes of the people, but without the impossibility of securing orderly progress.

The Legislative Powers of Northern Ireland.—The utility of the power of reference under s. 51 of the Government of Ireland Act, 1920, is clearly shown in the decision by the Privy Council of the rather heated dispute between the Belfast Corporation and the Government of Northern Ireland as to the validity of the provisions of the Finance Act, 1934, imposing a contribution on councils for the cost of educational services.⁵ The Act was alleged to be invalid because by s. 21 of the constitution the legislature may not impose income-tax, and, though the tax was imposed on the council, that body had to raise it by means of the poor rate, so that in effect the legislature was imposing an income-tax on the tax-payers. The Committee did not decide the question whether the legislature could

¹ 20 St. Tr. 239; Keith, *Constitutional Law of the British Dominions*, p. 92.

² See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 273-6.

³ 26 Geo. V and 1 Edw. VIII, c. 29.

⁴ Proclaimed on September 2, 1936. It gives the Governor full legislative power, but provides for an Executive Council, including five prominent Maltese members. By Ordinance the Italian language ceases to enjoy official rank.

⁵ *In re Reference, Government of Ireland Act, 1920*, [1936] A.C. 352.

be held to be taxing the tax-payers; but, assuming that it was, it ruled that a rate and income-tax were essentially different. Income-tax is levied on the tax-payer's income generally, rates are levied in respect of the occupation of hereditaments, without regard to general income and irrespective of the fact whether the tax-payer is or is not deriving profit from the occupation. The contrast, indeed, seems conclusive; the only point that can be deemed confusing is the mode in which income derived from occupation of premises is artificially based on annual value, not on real profits, but that is a very minor anomaly.

The Federation and the Provinces in Canada.—The vital issues between the Dominion and the provinces, brought to the front by the remarkable legislation of the Conservative government in Canada, have been clarified in considerable measure by the reports made by the Supreme Court on the reference by the Governor-General in Council. There is agreement in the Supreme Court that it is competent for Parliament to make it a criminal offence¹ to undersell competitors in order to drive them out of the field, and four justices to two hold that the seller of goods may be prohibited from preferring one customer to another by granting a rebate, obviously a much more defensible practice. All the justices agreed to hold invalid the Natural Products Marketing Act, 1934, as amended in 1935, on the perfectly clear ground that the constitution gave no power to regulate trade in the provinces in this wholesale manner, a principle clearly contained in the judgment of the Privy Council *In re the Board of Commerce Act*.² All but one of the justices held valid the Farmers' Creditors Arrangement Act, 1934, on the logical ground that it was essentially a statute regulating insolvency. All again were satisfied of the invalidity of s. 14 of the Dominion Trade and Industry Commission Act, 1935, on the ground that it was framed to cover purely internal trade, and of ss. 18 and 19, because they purported to create an alleged trade mark which was not a trade mark at all—even assuming that the federation has power in this regard—but a new civil right to be vested in the Crown, contrary to the principle that such a power rests with the provinces only. But on the Employment and Social Insurance Act, 1935, the Chief Justice and Davis J. were in disagreement with their colleagues. The Act provides for compulsory contributions from employers and employed and the distribution of the proceeds, and the measure appeared to them valid under the power to tax and to spend. The view taken by the dissentient justices is that in effect the Act invades a sphere reserved to the provinces, and that, if held valid, the federation might use its authority to nullify the distribution of powers between federation and provinces; and there is no doubt much to be said for this contention.

The Federation and the Treaty Power.—Most vital of all, however, is the issue raised by the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act.³ On

¹ Criminal Code, s. 498A.

² [1922] 1 A.C. at p. 201.

³ Cc. 14, 44 and 63 of the Statutes of 1935.

this issue there was equal division, and inevitably so, for the question involves the consideration of the true effect of the decisions in the *Radio*¹ and *Aeronautics*² Cases, in which the Privy Council assigned these subjects to the federation. Do these judgments give the federation power where it concludes a treaty on a provincial subject to invade the provincial sphere? Or are there special considerations applicable to radio-telegraphy and air navigation which make them *sui generis*? The issue is vital, it is claimed on the one hand, for only if the federation can act can these questions be disposed of on a wide basis, securing fair treatment for workers in every province. On the other it is asserted that the legislature which controls these issues in general should not find its functions sporadically interfered with by intervention from a legislature without general responsibility for local social and economic conditions. Even the Privy Council cannot lightly decide the contest.

The Commonwealth Parliament and Freedom of Trade.—It is satisfactory that the Privy Council should have been able finally to dispose of the vexed issue whether the rule of s. 92 of the Commonwealth Constitution binds the Commonwealth. The Commonwealth in *James v. The Commonwealth*³ appeared to uphold the validity of the system of controlled marketing of dried fruits and therefore to urge the validity of the Dried Fruits Act, 1928–35, and of the Dried Fruits (Inter-State Trade) Regulations made thereunder. The system is simple. In order to give producers of dried fruit throughout the Commonwealth the possibility of orderly and profitable marketing of their produce, the Act provided that such fruit could be transported from one State to another only under licence, and the Regulations under the Act made the issue of licences depend on the holder undertaking to export specified percentages of the fruits in question. Is this procedure compatible with the statutory requirement that trade, commerce and intercourse shall be absolutely free? In view of the state of judicial opinion in the Commonwealth⁴ where three justices out of five manifestly doubted the validity of the doctrine that the Commonwealth was not bound by s. 92 of the Constitution, and only held that it was not in deference to the view expressed in *W. and A. McArthur v. State of Queensland*,⁵ it is not surprising that the Judicial Committee found no difficulty in holding that the Constitution means what it *prima facie* says, and that s. 92 must bind the Commonwealth no less than the States. Not even Mr. Menzies' admirable argument could induce their Lordships to hold otherwise, since that would involve rewriting, not interpreting, the constitution. There seems no possible answer to this contention. Freedom of trade clearly was intended to abolish restrictions on the passage of trade across the frontier, and the Privy Council homologated the decisions in certain of the cases

¹ [1932] A.C. 304.

² [1932] A.C. 54. Cf. *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 265–7.

³ 52 T.L.R. 696.

⁴ (1935) 52 C.L.R. 570.

⁵ (1920) 28 C.L.R. 530.

already decided by the High Court and summarized in this *Journal*.¹ Illegal hindrances may include (1) compulsory appropriation of goods as in *James v. Cowan*² or *Peanut Board v. Rockhampton Harbour Board*,³ if in truth the expropriation is directed in whole or part against inter-State trade in the goods, *i.e.* selling them out of the State. Or again (2) the illegality may lie in placing a special burden on goods in a State to which they have come, simply because they have come from the other State, as in *Vacuum Oil Company Proprietary v. State of Queensland*.⁴ Still more obviously illegal is (3) the imposition of undisguised restrictions on passing from State to State. The burden may operate when the goods are still in the State of origin, as in the case of a compulsory expropriation order or a standstill order, or after transit as in the *Vacuum Oil* case. It is most important to note that this view in the opinion of the Committee is not inconsistent with any decided case with the doubtful exception of *McArthur's* case. Moreover, the Committee expressly held that it is a mistake to suppose that certain Commonwealth legislation of great importance depends for its validity on the non-application of s. 92 to the Commonwealth, dealing specifically with the Post and Telegraph Rates Act, 1902-23, the Wireless Telegraphy Act, 1905-19, the Secret Commissions Act, 1905, the Commerce (Trade Descriptions) Act, 1905-33, the Australian Industries Preservation Act, 1906-30, the Sea Carriage of Goods Act, 1924, and the Transport Workers' Act, 1928-9. On the other hand, their Lordships condemned the restrictions of the Dairy Produce Act, 1933-5. No doubt, while the result is perfectly clear in law, the result may have grave effects, nor is it surprising that the Commonwealth government should hold that constitutional revision is necessary to secure adequate power to control marketing.⁵ But this is one of the inevitable results, nor so much of a written constitution, as stated in the report, but of the restrictions of a federal constitution in which there must be division of powers with all the difficulties thence arising. It is curious that almost at the same time like difficulties have been raised in Canada, for which in law the Judicial Committee must provide the decision. But Canada has not the power enjoyed by the Commonwealth to secure amendment by referendum approving legislation, and it may be more difficult in her case to secure wider powers for the federation.⁶ Even in Australia it must be noted that Tasmania and Western Australia appeared to deny the authority of the Commonwealth.

¹ *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. i, pp. 122-6.

² [1932] A.C. 542.

³ (1933) 48 C.L.R. 266.

⁴ (1935) 52 C.L.R. 157.

⁵ No accord could be achieved at a Conference in August as to the propriety of such action, the responsibility of seeking a change thus devolving on the federal government. In October the Labour party declared inadequate the government's proposals.

⁶ The defeat of the Liberal government of Quebec by a movement nationalist in character renders assent to increase of federal powers most improbable. A proposal to give the provinces power of indirect taxation was rejected by the Senate in June.

The Church of England in South Africa.—Memories of famous controversies are revived by the very important decision rendered in the Cape of Good Hope Provincial Division of the Supreme Court of South Africa in *Mills and Others v. Registrar of Deeds and Others*.¹ The point at issue was the question in whom should be vested control of Bishop's Court, the residence provided for the Bishop of Cape Town under the provision made in 1847 for the establishment of a bishopric and of the endowments. The plaintiffs rested on the fact that the original endowment had been made under the belief that the Crown could create a bishopric of the Church of England in the strict sense in South Africa, and that since it had been established that the Church of the Province of South Africa was distinct from the Church of England, though in communion with it, the trust funds should not be applied to provide the Archbishop of Cape Town in that church with an income nor should the residence be vested in him and other officers of that church. The defendants finally rested their case on the doctrine that the original trust had failed; that the income from the trust funds should be applied *cy pres*; and that the Archbishop was the proper recipient on this basis. The impossibility of erecting in the Cape by the prerogative a church which would be essentially a part of the Church of England was established by the Privy Council in *Long v. Bishop of Cape Town*² and *Ex parte Lord Bishop of Natal*,³ and the church had therefore to be established on a contractual basis. Its constitution, however, expressly negatived the submission of the new church to decisions on faith and doctrine of the Privy Council, and as a result certain evangelical congregations remained outside its membership. Legally the Privy Council in *Merriman v. Williams*⁴ held that the new church was not part of the Church of England and could not claim control of property held in trust for ecclesiastical purposes in connection with the Church of England. This naturally raised the issue of the application of the funds connected with the Cape Town see, but the issue was not finally pressed by the evangelicals, partly because the successors of the first bishop down to 1930 had been consecrated by the Archbishop of Canterbury, and thus could be held to be within the purposes of the endowments. But in 1930 the new Archbishop Phelps was not so consecrated and one of the evangelical churches, Trinity Church, secured the appointment by the Cape Court of trustees, it being ruled that the Archbishop was not a successor in title to Bishop Gray.⁵ In the same way the Chancery Division *In re Colonial Bishoprics Fund*⁶ decided that Archbishop Phelps

¹ June 23, 1936. I owe a copy of this judgment to Mr. C. W. A. Coulter, M.P., who has acted for the Church of the Province of South Africa.

² (1863) 1 Moo. P.C. N.S. 411; 4 S. 162.

³ (1865) 3 Moo. P.C. N.S. 115. Cf. Keith, *Responsible Government in the Dominions*, ii, 1127 ff.

⁴ (1882) 7 App. Cas. 484.

⁵ *Darroll and Another v. Tennant and Another*, [1931] C.P.D. 514 and [1932] C.P.D. 405.

⁶ [1935] 1 Ch. 148.

could not claim as such income of the endowment, but awarded it to him on the *cy pres* principle. The Cape Division in a most interesting judgment adopted the like doctrine. It stressed the fact that it was impossible in view of the evidence of the Archbishop of Canterbury to contemplate any possibility of the Crown issuing authority for the consecration of a bishop of Cape Town as a rival to the Archbishop of the local church ; that the two churches were very closely allied ; and that the courts of the local church had never in fact sanctioned doctrines contrary to the law declared by the Privy Council. There was therefore every reason to admit the doctrine *cy pres*, especially as the donor—the Baroness Burdett Coutts—had acquiesced if reluctantly in the payment to Bishop Gray's successors. But the judgment which orders payment of the fund income to the Archbishop is subject to further order, if the Church of the Province of South Africa ceases to be in communion with the Church of England, or alters its constitution so as no longer to accept the standards of faith and doctrine of that church, or if its courts interpret the standards and formularies of the Church in a sense different from that adopted by the ecclesiastical courts in England, or if in some unexpected manner a bishop of the Church of England is consecrated who more closely would fulfil the objects of the trust than the Archbishop, or if the income increases so as to exceed the needs of the trust.

The Representation of the Natives Act.—The coalition between General Hertzog and General Smuts has at last had its necessary effect, the surrender of the latter to the demand for the abolition of the Cape native franchise as hitherto existing. The step was inevitable as part of the consistent carrying out of the doctrine of racial superiority, which was offended against vitally by the existence of the franchise under which natives could vote, though on a much restricted franchise, for members of the Union Parliament and the Cape Provincial Council side by side with Europeans. Supporters of the doctrine have noted with satisfaction that it has received the endorsement of the Führer in Germany, but it proved impossible to secure native acceptance, as a satisfactory compromise, of the compensation provided. This takes the shape of the election by restricted constituencies of four Senators for the Union, and by native voters in the Cape under the present franchise of three extra members of the Assembly and two of the Cape Provincial Council,¹ and the creation of a Native Representative Council for the Union. This body has twenty-two members, twelve elective, and is essentially an advisory body with power to make suggestions for the consideration of the Union Parliament and the Provincial Councils. Its value, of course, must depend on the amount of attention paid by these bodies to its observations, and past experience suggests that there is much force in the view that it is very difficult to expect legislatures to legislate except in accordance with the obvious interests of their constituents. Of legal

¹ These must be Europeans. The Bill of 1926 gave far more generous terms as Senator Hofmeyr pointed out.

interest are the efforts made to secure judicial intervention. The Cape Provincial Division on April 13 expressly held that it could not inquire into the question whether the Speaker had presented in due form the address passed by the joint sitting of the two Houses which passed the Bill notifying the result, by forwarding it to the Governor-General. It also in *Mosui v. Jansen, N.O.*, on April 17 ruled incidentally that it would seem that it could not interfere with the Speaker in presenting the address, even if the Bill in question were *ultra vires* the Parliament in joint session, while it declined to declare the future rights of an applicant under the powers of making declarations given by Act 45 of 1935 (s. 102) unless these rights were specifically set forth. The only obvious point of doubt of course was whether the new register for native voters complies with the saving in s. 35 of the South Africa Act, 1909, for the rights of existing voters, and, even if that could be held doubtful, the complete sovereign power of the Union Parliament under the Statute of Westminster, 1931, would avail to render the issue of no value to the natives.

The Law of Treason in the Union.—The nature of the *crimen laesae majestatis* and of the *crimen laesae venerationis* as a branch thereof has had to be considered in the Union as a result of the discontent among natives due to the Union legislation. In the Natal Provincial Division the issue arose whether the *crimen* could be committed against the British monarch on the score that Voet's Commentaries treated *majestas* as *legibus civilibus soluta*, which was manifestly inconsistent with the position of the King in the Union. This view was rejected by the court which held that *R. v. Christian*¹ implied that a government whose head was not a monarch with unlimited powers might possess *majestas*, and that convictions for treason had been recorded in South Africa. Before the appeal from this case could be heard, a like issue was dealt with by the Cape Division in *Gomas v. R.* and *Gomas and Gool v. R.*² The accused there argued that the Status of the Union Act, 1934, had deprived the King of any prerogative in the Union, but Davis J., without accepting that contention as correct, held that even in England the King had not *majestas* in the technical sense, and that in any case the charge made of indignity by written or spoken words to the King was no crime since violation of the *majestas* of the Union must also be alleged. In *R. v. Roux*³ the Appellate Division placed the matter on a clear footing. It overruled the conviction recorded in Natal on the simple ground that the words complained of could not injure the honour or dignity of the King or bring him into contempt. They could not be construed as seditious or as inducing mutiny and insurrection whereby the welfare of the King and State was placed in danger. Freedom of speech and political criticism had been achieved, in a manner unknown in the Middle Ages. Beyers J. A. went farther and questioned whether the *crimen laesae venerationis* existed in the Roman Dutch law, holding that in any case it was not in force in the Union. The decision is clearly desirable; no government can safely

¹ [1924] A.D. 101.

² 5 S.A.L.T. 41.

³ 5 S.A.L.T. 98.

be exempt from criticism and the attack on the King was manifestly meant as an attack on the Union government.

South-West Africa.—The Union Commission which was charged with the duty of reporting on the position of the mandated territory failed wholly to achieve any agreement on the issue of the desirability of including the territory as a fifth province in the Union. There are obvious objections to this course. The German population, which is now under Nazi influences, objects to any inclusion as meaning the loss of the individuality of the territory and its evolution to self-government or inclusion in the Reich. The finances of the area are such that it would be very difficult to fit it into the provincial scheme. Only one Commissioner, therefore, thought the time ripe for inclusion in the Union, one was definitely unfavourable, and one held that the time for such action had not arrived.

The Liability of the Territory for Pre-War Debt.—As I pointed out¹ many years ago, the British view negatives recognition of State Succession to the debts of an annexed territory, unless specific provision is made to this end on annexation. The writers on State Succession,² however, still insist on the principle of succession, and it is interesting to find that the High Court of South-West Africa has asserted once more the British principle in respect of the claim made in *Verein für Schutzgebietsanleihen v. Conradie*³ for payment in respect of German imperial loans charged on the revenues of South-West Africa. The adverse decision was based on the ground that the claim was founded on the conclusion in law of the declaration that the Mandated Territory was identical with the juristic person known as the Protectorate of German South-West Africa, whereas mandated territories had no identity with the former German colonies, but were new creations of the Supreme Council pursuant to the treaty of Versailles, 1919. But the court also stressed the fact that to charge a colony with loans raised for its benefit is merely an administrative device which cannot impress the territory with liability when it has ceased to be part of the complex, for it was only for the purposes of that complex that the device was invented. It is in fact clear that neither Germany nor the powers, when the transfer of territory was made, contemplated the bearing of the burden of loans by the powers to which the territories might be assigned, so that the judgment of the court is not merely in law but also morally beyond criticism.

Appeals in Criminal Causes from Jersey.—It is not surprising that the Judicial Committee had no difficulty in finding that there was nothing in the constitution of Jersey to show that the Crown had ever surrendered its right to grant special leave to hear an appeal from Jersey in criminal causes.⁴ It would indeed have been remarkable if any sovereign had ever

¹ Keith, *State Succession in International Law* (1907), pp. 58 ff.

² Cf. especially A. N. Sack, *Les effets des Transformations des États sur leurs Dettes Publiques*, 1 (Paris, 1927), and see E. H. Feilchenfeld, *Public Debts and State Succession* (1931), pp. 548 ff.

³ 5 S.A.L.T. 79 (March 21, 1936).

⁴ 52 T.L.R. 455.

parted with so sovereign a power, and the historical investigation carried out by the Committee clearly established that none of the instruments relied on dealt with the prerogative right, though they made it clear that no appeal of right lay to the Crown. The decision accords with dicta *In re Abraham Ames and Others*¹ and *Esnouf v. Att. Gen. for Jersey*.² One point of interest is not covered by the decision. If, as *prima facie* is the case, Jersey is a possession abroad within the meaning of the Judicial Committee Act, 1844, would it have mattered whether the Crown had endeavoured to lay aside its prerogative? Would not the statutory right have renewed the power to grant leave? The answer seems necessarily to be in the affirmative, though the stress laid by the Committee on the contention that the right had never been surrendered is rather curious. On the merits of the case the Committee applying its ordinary rules did not interfere.

The Limits of Criminal Appeal.—The very difficult question of the limits of criminal appeal is raised in the decision in *Attygalle and Another v. Rex*.³ The trial judge in Ceylon had charged the jury to the effect that s. 106 of the Law of Evidence Ordinance, 1895, placed on the accused, who were the only persons present when an alleged illegal operation was performed on an unconscious woman, the burden of proving that they had not committed a crime. Clearly, if the Committee had been sitting as an ordinary Court of Criminal Appeal it would have found great difficulty in not quashing the conviction, but it ruled that, as there were circumstances pointing irresistibly to the guilt of the accused independently of the direction, there had been no such substantial injustice, no such deprivation of the substance of fair trial as the cases showed to be necessary to allow the appeal. It was expressly mentioned that, while the language used in *Lawrence v. R.*⁴ might have to be considered later, it was not the intention of the Committee in that case to modify the existing rule in the matter of appeals. Possibly, however, it may prove increasingly difficult to maintain the limitation asserted. It was first adopted at a time when criminal appeal was foreign to English law, and the value of that appeal in England must tend to induce the Committee to closer supervision of proceedings in oversea courts.

Appeal in the Case of Contempt of Court.—In the case of *Ambard v. Att. Gen. for Trinidad and Tobago*⁵ the Committee affirmed deliberately what was done without debate in *McLeod v. St. Aubyn*,⁶ the right of the Privy Council to hear appeals from colonial decisions awarding punishment for contempt of Court. Were it not that the right had been denied by the Committee itself in *Rainy v. Justices of Sierra Leone*,⁷ the matter would have seemed clear beyond doubt, whether based on the prerogative or on

¹ (1841) 3 Moo. P.C. 409.

² [1936] A.C. 338.

³ [1936] A.C. 322.

⁴ (1853) 8 Moo. P.C. 47. Cf. *McDermott v. British Guiana Judges*, (1868)

L.R. 2 P.C. 341.

⁵ (1883) 8 App. Cas. 304.

⁶ [1933] A.C. 699.

⁷ [1899] A.C. 549.

statute, for the Act of 1844 applies beyond question to Trinidad. The value of the appeal is singularly shown in both cases where it has been allowed. It is clear that, having regard to the importance of the functions of the courts, it is desirable that fair criticism, not actuated by malice and not intended to bring the administration of justice into disrepute, is not merely permissible but often desirable. The point on which the comment was made was the remarkable inequality between the sentences imposed on a man who attempted to shoot a superior officer, and was convicted of shooting with intent to do grievous bodily harm, and on another who was convicted of wounding with intent to do grievous bodily harm, and who in fact seriously mutilated a woman. Such episodes raise public feeling, and frank comment cannot be properly shut off.

NOTES.

Disposal over German Estates by British Executor.—A learned German contributor has sent us the following note :

The Court of Appeal at Frankfort-on-Maine has recently given a decision on an interesting question of the International Law.

The facts of the case are the following : A, a British subject domiciled in England by his will duly executed in the presence of two witnesses, appointed B as his executor and trustee with instructions to collect and sell the whole estate other than money. Having obtained Probate B sold the real estate situated in Germany, but the judge of the Land Register Office refused to acknowledge the capacity of the executor to transfer property in Germany unless such capacity was evidenced by a "*Testamentsvollstrecker-Zeugnis*," which is the German equivalent of the English Probate. B appealed, but the Court of Appeal at Frankfort-on-Maine dismissed the appeal for the following reasons :

The rules of English law must be applied to this case, and such law does not regard the estate as a unit (as is the case in Germany), but distinguishes between personal and real estate. So far as personal estate is concerned the English law prevails, but with regard to real estate that law refers to the *lex rei sitae*. Therefore real estate situate in Germany, even though owned by a British national, is subject to German law.

The English executor has the same powers as the German "*Testamentsvollstrecker*" as regards real estate in Germany. The executor of German law is the representative of the heir, and according to German law¹ his title must be proved by a Certificate (*Testamentsvollstrecker-Zeugnis*) or, if his right is based on a will, contained in a public deed, by this deed together with the protocol of the opening of the deed.

The German law² distinguishes between two types of wills : (a) the public will made before a judge or a public notary ; (b) the private will which is holograph and does not require attestation.

B was not appointed by A in a public deed, but by a private will, and although the grant of Probate issued by the Probate Division is a public document, it cannot establish the competence of the executor, as this evidence can only be given by a public will. The English executor must therefore apply for a certificate from the German law courts.

It is a matter of dispute in International Law how far a grant of

¹ Para. 35, II *Grundbuch Ordnung*, and Para. 2368 BGB.

² Para. 2231 BGB.

Probate should be treated as a valid legitimation of executory powers, and the Frankfort court maintains that it is only valid in British Territory, since the English law recognizes the *lex rei sitae*, and therefore different rules apply to such portions of the real estate as are situate in different countries.

(1) The succession to foreign real estate of a British subject is determined by the *lex rei sitae*.

(2) As the British courts disclaim any authority in this respect their examination of an executor's title is not effective and the grant of Probate is a document whose operation is restricted to the estate situated in England.

(3) Therefore, the executor appointed by the ordinary English private will requires a certificate as executor from a German court in order to dispose of real property in Germany.

The result is (if this decision be correct) that an English executor should observe the following points with regard to the administration of German real estate :

(1) He should apply for a "*Testamentsvollstrecker-Zeugnis*" from the German court under whose jurisdiction the real estate falls.

(2) This court will then consider whether such a certificate should be granted, and since they will not accept the will as a public document, which suffices in itself to give the executors powers,¹ it must be proved by documentary or parol evidence, that the will by which the executor was appointed was valid, and had not been revoked or replaced by another will, and that no proceedings are pending with regard to the succession. The heir at law is entitled to be heard as to the legality of the executor's appointment.²

(3) If so satisfied the German court will issue the necessary certificate to the English executor, who will then be competent to administer the real estate in Germany.

This decision seems open to doubt, since the British grant of Probate, which contains the will of a deceased, must be considered as a public document, and would seem to satisfy the requirements of Para. 35 *Grundbuch Ordnung*, and this grant should, therefore, be sufficient legalization of the executor as such. It does not matter for the purposes of Para. 35 *l.c.* whether the public certificate is a German or foreign document, and it is therefore submitted that an application for a formal certificate from the German courts is unnecessary. It will be interesting to see whether this decision is followed in similar cases.

DR. FRITZ BALLIN (London).

Report of the Royal Commission on the Dispatch of Business at Common Law (1934-6).³—This Commission was appointed in 1934 "to

¹ Para. 2368 BGB.

² Paras. 2355, 2356, 2368 BGB.

³ H.M. Stationery Office. Price 2s. 6d.

inquire into the state of business in the King's Bench Division of the High Court of Justice and to report whether, with a view to greater dispatch, any reforms should be adopted." It was composed of Lord Peel, Lord Hanworth, Sir Claude Schuster, Mr. J. G. Archibald, Mr. Clement Davies, Mr. Walter Monckton and Mr. Harold Murphy. The first part of the report is concerned with the present state of business in the King's Bench Division. The Commissioners find that by the beginning of 1936 arrears in that Division "had shrunk to remarkably small proportions," but think that this decline may be "to some extent evidence of the growing reluctance to resort to the Courts." More present evils are the uncertainty as to the time which may elapse before a case comes on for trial, and the overloading of the daily cause lists, due to an exaggerated fear of leaving judges with nothing to do. The difficulty of arranging the lists so as to economize judicial time without inconvenience to litigants is largely due to the circuit system; but the suggestion that branches of the High Court should be permanently established in the provinces is decisively rejected. While recognizing some of the difficulties, the Commissioners favour an attempt being made to have all cases set down for trial on an appointed day. It may perhaps be questioned whether they have sufficiently appreciated the tendency of this system, of which, in a foreign country, the present reviewer has some experience, to import into trials an atmosphere of undue haste. Among other suggestions for the lightening of the burden imposed upon the King's Bench Division the Commissioners propose a considerable extension of the jurisdiction of the Courts of Quarter Session, and "recommend that the plaintiff should be allowed to initiate proceedings in the County Court in cases of a type now within the jurisdiction of that Court where the sums involved are not less than £100 and not more than £300, with an absolute right in the defendant to transfer to the High Court." But the most interesting of the Commissioner's proposals is that, in cases tried by a judge alone without a jury, the rules of evidence should be so further relaxed, that "the judge should have a discretion to admit all documents and records relating to the matters in question which came into existence before the dispute arose"; and that "the Court should have power to admit affidavit evidence or even unsworn declarations, without limitation, the adversary having a right to cross-examine only when the subject-matter is important and seriously disputed."

The Commissioners favour the adoption of a retiring age for judges, to be fixed at seventy-two years of age.

M. S. A.

Young Offenders.—At a time when there is a good deal of uninformed discussion regarding the treatment of juvenile delinquents it is valuable to have before us the First and Second Clarke Hall Lectures, those sane and humane pronouncements on "The Ethics of Penal Action" by the Archbishop of York and on "The Treatment of the Young Offender"

by the Lord Chief Justice of England.¹ The increase in the number of youthful wrongdoers has led to a demand in some quarters for the lavish use of the birch, as a substitute for, or as a prelude to, detention in a school. Dr. Temple has some wise words to say on the matter—words which gain force from the fact that they come from a former head master of a great public school. “To the boy,” he says, “the State-inflicted penalty is not the reaction upon him of any community which he can recognise as his; consequently it loses its quality of justice and presents itself as mere vengeance—an act in a *vendetta* to be followed, if possible, by a counter-stroke of his own.” And the Archbishop goes on to say: “I should certainly expect to find that a State-inflicted flogging tends to turn juvenile delinquents into definite criminals. . . .” These statements are in the tradition of the late Sir William Clarke Hall, who saw in every young delinquent a potential good citizen, for his aim in treatment, as Sir Herbert Samuel reminds us in a Foreword to the Archbishop’s address, was to secure full information of the character and circumstances of the offender and then to give training and care, guidance and help. These principles are embodied in the Children and Young Persons Act, for which Sir William was largely responsible. The importance of these principles, which most magistrates believe will stand the test of time, was urged by the Lord Chief Justice, not only as regards child offenders, but also in the case of adolescents between 17 and 21. His Lordship pressed home strongly the harm wrought by short sentences of imprisonment in which there is no opportunity for re-education. He recalled the experience of prison governors, which, he said, “appears to be almost invariably against the sentence of imprisonment for adolescents.” Borstal training, he considers, is indicated in the majority of cases and he asked us to remember there are now seven institutions for boys, that careful investigation into character and antecedents is made while the boys await transfer, that classification is maintained and the right environment chosen. These provisions touch, however, only a limited number of young offenders. There will be much sympathy with the regret expressed by Lord Hewart at the absence of central remand homes for the observation and examination of delinquents.

No suggestion made by his Lordship was of more significance than that of appointing the right kind of magistrate in sympathy with the principles which should inspire the Juvenile Court. The Archbishop in his address touched on this subject in a somewhat different way. His view that there is an absence of effective co-ordination in penal action owing to the non-existence of a Ministry of Justice has some bearing on the matter. In England, judges and magistrates are appointed by the

¹ “The Ethics of Penal Action,” by the Most Reverend William Temple, D.D., D.Litt., Archbishop of York. The First Clarke Hall Lecture, 1934. “The Treatment of the Young Offender,” by the Lord Chief Justice of England, the Right Hon. Lord Hewart of Bury. The Second Clarke Hall Lecture, 1935. The Clarke Hall Fellowship, 47 Whitehall, S.W.1.

Lord Chancellor, while recorders and stipendiary magistrates are appointed by the Home Secretary. "Each of these high officials," he remarks, "has a multitude of other responsibilities and the two may act by different and even divergent principles." The Archbishop was not, of course, in a position to say in how far the present practice leads to divergence of treatment in Juvenile Courts, but official inquiries have shown that there is considerable variation in the courts regarding the extent to which probation is used and children are committed to approved schools.

While it is recognized that no hard-and-fast rule can be laid down which will apply in every case of neglect or delinquency, some of the difficulties are overcome if the Juvenile Court is fully impressed with the need of ensuring the welfare and education both of young offenders and of neglected youth. Unfortunately at the present time we do not know enough about the factors which make for juvenile wrongdoing. *The Year Book of Education*,¹ in a number of useful chapters, enlightens us on some of the factors which may induce anti-social conduct. Professor Hanley, in the section dealing with the C. child, refers to the emotional accompaniments of mental disability—that sense of frustration which may lead to delinquency in order to satisfy the natural craving for superiority. Dr. Cyril Burt holds the view that 80 per cent. of delinquents are below the average in intelligence. A good many people may be disposed to regard this figure as too high, but they are likely to agree with Dr. Field in his "Study of Psychological Aspects of Juvenile Delinquency," that the lack of early experience of affection and security has a marked influence in leading to wrongdoing in later years and that "broken homes provide a disproportionately high number of delinquents." Poverty and overcrowding add to the difficulties of parents, but it is also true that family problems occur at all economic levels and disturb the social behaviour of children. But this is not the whole story. As Dr. Field reminds us, our present knowledge of the springs of conduct and of the different stages in moral development is very fragmentary. The schools endeavour to develop good habits and a moral sense and to make good the gaps in home training. These efforts are supplemented in the case of the young delinquent by probation officers. Probation, however, is not always wisely used, as Sir Vivian Henderson points out in his chapter on "Juvenile Delinquency." Some courts still place juveniles on probation for far too short a period, and this method is tried more than once, even if the probationer does not respond. Many probation officers are gravely overburdened with work, and it must be recalled, too, that some 400 courts are without a woman probation officer. There is a tendency still to send older offenders between 17 and 21 to prison, although many of them may never have been convicted before. Indeed, the Clarke Hall lectures and the illuminating sections in *The Year Book* dealing with young offenders and their psychological difficulties show us that there is

¹ (London : Evans Bros., 1936.) 35s.

still a long road to travel, both in school and out of school, if we are to stem the tide of youthful wrongdoing. It is possible that the child guidance clinics will help in this direction as they gain wider experience, but most people will agree that what is needed more than guidance for the child is guidance for the parent.

N. ADLER.

Medico-legal Problems.—The Medico-Legal Society is doing valuable work in England in bringing together the medical and legal problems common to both. The proceedings are available in *The Medico-Legal and Criminological Review*, which in addition contains abstracts of medico-legal literature in other countries. It also includes from time to time the proceedings of other bodies relating to its special subjects, such as a paper¹ read before the Society of Medical Officers of Health by Dr. Robert Forbes, the Secretary of the Medical Defence Union, on Medico-Legal Problems in Hospital Practice. In his experience the litigiousness of the general public has undoubtedly increased in recent years. Particularly is this tendency observable when the patient has been in a hospital under the control of a local authority. The decision of the House of Lords in *Lindsey County Council v. Marshall*, in which the Lord Chancellor laid down "that there is no authority in the decided cases or elsewhere for the view that where a corporation acted by an agent their liability for the mistakes of that agent was any less where the agent was a medical man than where the agent belonged to any other profession or calling,"² is not likely to diminish that class of litigation. It is rather remarkable to find a precisely opposite state of affairs in the United States, where the law is stated by Professor Oppenheimer in his *Treatise on Medical Jurisprudence*³ to be as follows:

"In the absence of legislation to the contrary, a public hospital created and existing for purely governmental purposes, and under the exclusive ownership and control of the State, is not liable for injuries to a patient caused by the negligence or misconduct of its employees or for personal injuries suffered by an employee, even though the statute may declare it to be a corporation which may sue and be sued" (p. 221).

This is supported by reference to a large number of cases decided in different States, and throughout the book comparatively little use is made of English decisions, though the position of medical men in their relations with their patients have similarities under any system of law. On the vexed question of the ownership of X-ray films, Professor Oppenheimer makes no reference to three American cases cited by Mr. Harcourt Kitchin in his admirable series of contributions to the *British Medical Journal* which have been collected in a volume entitled *Legal Problems in Medical Practice*.⁴ In his opinion the question of ownership "is purely

¹ Printed in vol. iv, pt. iii, July 1936.

² *The Times*, July 15, 1936.

³ London: Baillière, Tindal & Cox. Pp. xi + 291. 18s.

⁴ London: Edward Arnold. Pp. 227. 10s. 6d.

one of the exact nature of the contract to be implied between doctor and patient." Besides making useful references to American cases, Mr. Kitchin has also included a consideration of decisions in the courts of the Dominions. He takes exception to the judgment *Harkies v. Lord Dufferin Hospital*¹ in harmony with other Canadian decisions that a hospital is not merely under an obligation to supply properly qualified nurses but to nurse the patient. He does not note, however, that the New Zealand Supreme Court has come to the same conclusion.²

All the writers of text-books on the legal position of medical men are concerned with the question of professional secrecy. Professor Oppenheimer observes that "in Germany and in most of the other Continental European countries a physician is *obliged* to report to the authorities any case in which it may appear that a crime has been committed, and he *may* also report any case which, in his judgment, requires it. However, he may (and ordinarily will) refuse to divulge in court any information obtained by him in his professional capacity, whenever *in his opinion* ethical considerations require that he remain silent. . . . Accordingly it may be said that in Continental Europe the privilege, like the original privilege of the attorney in England, is treated not as a legal postulate, but as an *objective* right which belongs exclusively to the physician, and which may be waived by him whenever, in his judgment, concealment is unwarranted" (pp. 177, 178). While Dr. Kerr lays down, in his work on Forensic Medicine,³ as a general rule that a doctor should not divulge anything which he learns in confidence from his patients, he points out that when his patient's health is a source of danger to the public, it may be necessary for a doctor to divulge this to persons who would be affected if the patient fail to take the necessary action to remove the danger. Forensic medicine covers a wide range of medico-legal problems mainly associated with criminal law. The fact that a second edition of Dr. Kerr's book has been required only twelve months after its original publication is sufficient evidence that the authority of the writer has received general recognition.

In Scotland the Universities of Edinburgh and Glasgow have chairs of Forensic Medicine, but there is nothing comparable in England, and Lord Atkin's Committee on the Scientific Investigation of Crime⁴ noted that "so far as London is concerned no facilities whatever exist for dealing in any comprehensive manner with the subject as a whole." Accordingly they proposed the establishment of a National Medico-Legal Institute with a recognized place in the academic sphere as a School of the University of London in the Faculty of Medicine. It would provide a post-graduate course leading to a diploma. At the Institute would also be

¹ (1931) 2 D.L.R. 440.

² *Logan v. Waitaki Hospital Board*, (1935) N.Z.L.R. 385.

³ *Forensic Medicine*, second edition. (London: A. & C. Black, 1936.) Pp.

x + 331. 15s.

⁴ Published by H.M. Stationery Office. 2d.

given courses of instruction for students of law, and for persons, or bodies of persons, whose duties require, or would benefit by, more detailed knowledge of the subject of forensic medicine. The Committee also considered that the Institute should be equipped to undertake a substantial amount of routine work of a medico-legal character, which should proceed side by side with—and, indeed, as an integral part of—its academic functions. It is not necessary here to enter into the details of the proposal, but it is obvious that the establishment of such an Institute in the metropolis of the Empire is long overdue.

C. E. A. B.

Spelling in the Statute-book.—The English Statute-book naturally illustrates the changes in English spelling throughout the centuries. It also shows the variations which we permit ourselves to-day. One draftsman, for instance, will write "connection," where another writes "connexion." "Wagon" or "waggon," "authorise" or "authorize," "dependent" or "dependant," "excisable" or "exciseable"—there are plenty of tests of personal preference. Variant spellings of a word will occur even in the same Act of Parliament. A Bill is a palimpsest whereon many hands will have written before its final enactment prevents all further amendment; it may be nobody's business to detect orthographical discrepancies. Thus "recognisance" and "recognizance" are found side by side in several Statutes, *e.g.* in the Children Act, 1908 (ss. 58 (4) and 60), and in 3 & 4 Geo. V, c. 7 (ss. 2 and 3), and 4 & 5 Geo. V, c. 58 (ss. 9 and 10). The Children Act contains other examples of alternative spelling such as "cognisance" and "cognizance" (ss. 58 (8) and 125), and "misdemeanor" and "misdemeanour" (ss. 16 (1) and 132 (10)). "Recognise" and "recognizing" occur together in the brief compass of 2 & 3 Geo. V, c. 2. If draftsmen have far more important things to think of than the minutiae of textual criticism, there is probably some pedant who will pounce upon these trifles for his private museum with all the ardour of a schoolboy pursuing a rare butterfly. The use of the hyphen is another opportunity. Adjacent clauses of 3 & 4 Geo. V, c. 38 contain "hereinafter" and "herein-after"; 9 & 10 Geo. V, c. 69 has "subject matter" and "subject-matter." The collector is sure to have specimens of "Attorney General" and "Attorney-General," "court martial" and "court-martial," just as he will also have noticed that "femme sole" in the Married Women's Property Act, 1907, became "feme sole" in the Law Reform Act of last year. But enough of these instances; a museum catalogue is dull reading.

While an advisory committee enables broadcasting to conventionalize English pronunciation, no Academy, official or otherwise, imposes uniformity upon our spelling. Cabinet Ministers were once told, in another connexion, that it did not much matter what they said but they must all say the same thing. If this maxim of Melbourne's were ever to be applied to Parliamentary spelling, the ideal basis of uniformity would be the many massive volumes of the *Oxford English Dictionary*. Far more

compendious, and scarcely less authoritative, is the admirable little *Authors' and Printers' Dictionary*, now in its seventh edition, published by the Oxford University Press. Here the reader will find the accepted spelling of awkward words like balloting, barrelling and benefiting, install and instalment, the proper hyphenation of bank-note and charter-party, and the right insertion or omission of *e* before the suffix -able. There is a useful hint about economy in the use of capitals—"when in doubt use lower case." There is another about commas—"in case of doubt omit." Punctuation is not perhaps a care of the draftsman. Judges, when interpreting Statutes, can ignore or rearrange the stops as they see fit; and sometimes, as in our Local Acts, there are no commas or colons to be considered at all. Finally, one other warning from the little volume deserves attention: "Labourers Act," it reminds printers, must not have a possessive apostrophe. The lay press often prints "Solicitors' Act," "Dentists' Act," and so on; a worse mistake, "the Children's Act, 1908," actually appears in the Statute-book itself (in the *Infantide Act*), a sure sign of a private member's drafting. C. T. C.

Law in Force.—The student of law can find in the *Annual Register*¹ a synopsis of the debates which form the background of legislation and are necessary to an adequate appreciation of its import. The *Annual Register* for 1934 dealt at some length with the proceedings which led to the Government of India Act so that the issue for 1935 does not include any details. It is particularly useful, therefore, to have the admirable summary by Mr. W. I. Jennings, Reader in English Law in the University of London, in the *Annual Survey of English Law*.² In the section of Law in the *Annual Register* reference is made to the trial of Lord de Clifford on a charge of manslaughter as a matter of some constitutional interest, though it seems to have escaped notice in the *Annual Survey*. Both publications are agreed in directing attention to the importance of the housing legislation of the year, while the latter supplements its summary by adding extracts from the official documents bringing the law into operation. The particulars, with detailed references, of the statutory rules and orders, memoranda, etc., constitute a particularly useful feature of the *Annual Survey*.

In discussing cases the *Annual Register* might be a little more precise instead of referring merely to "a 1926 case" (p. 81), especially as the writer comments more freely than his learned friend in the *Annual Survey* who sums up *Re Bromage*, [1935] Ch. 605 by adding: "Presumably the views of Bateson J. in *Mart v. Mart*, [1926] P. 24, must be considered as no longer having any weight." Both commentators find great difficulty in the cases arising under the Law Reform (Miscellaneous Provisions) Act, 1934, which was intended to eliminate the maxim *actio personalis moritur cum persona*. The confusion which has arisen appears to be due

¹ London: Longmans, Green & Co. 30s.

² London: Sweet & Maxwell. 10s. 6d.

to inadequate consideration of the underlying principles prompting this important amendment of the law, and Mr. Seaborne Davies suggests (*Annual Survey*, pp. 159-60) "that in the solution of our present difficulties some reference to the principles found acceptable in other countries with experience of 'survival' actions might prove helpful." Thus once again is demonstrated the failure of well-intentioned efforts due to the Englishman's neglect of the study of comparative legislation.

In criminal law the *Annual Register* refers to the House of Lords judgment in *Woolmington v. Director of Public Prosecutions* as involving "a point of law of exceptional importance" since it buttresses (to use Mr. Seaborne Davies's word) the Englishman's "benevolent insistence on the presumption of innocence until guilt has been fully established."

The complicated decisions on Revenue matters which were beyond the range of the *Annual Register* receive detailed consideration by Mr. W. I. Jennings in the *Annual Survey*, and upon that work reliance can be placed for rapid reference to anything of importance in the legislation, case law and legal literature of the year.¹

Dr. Jenks, in his new edition of *The Book of English Law*,¹ particularly expresses his indebtedness to the *Annual Survey of English Law* in providing a review of the statutes, decisions and literature since the previous edition was published four years ago. Although primarily intended for the layman and the foreign student of English law, the book has now gained an established reputation among lawyers also as providing a reliable and readable statement of the fundamental principles of English law. At the end of the eighteenth century Blackstone's *Commentaries* were read by anyone who desired to be educated to take any active part in current affairs, and it is not too much to say that Dr. Jenks's volume is entitled to a similar place in public estimation.

C. E. A. B.

Uniform Law of Sale of Goods.—In the beginning of 1935 the Institute for the Unification of Private Law of Rome, a subsidiary organ of the League of Nations, published its draft code of a uniform law of sale of goods, the result of long deliberations among eminent lawyers representing the more important contemporary systems of law. In this task the Rome Institute had been supported by a very extensive comparative research, undertaken by the Kaiser-Wilhelm-Institut for foreign and international private law of Berlin under the leadership of Professor Ernst Rabel. The results of this research, intended to serve as material for the discussions of the Rome Institute, have now been systematically summarized and are being published by the Berlin Institute. The first volume, which has already left the press, is one of the most important works in the sphere of comparative research ever published. It is to be doubted whether there exists any other work based on an equally extensive and thorough study of the different existing laws. With such

¹ London : John Murray. 12s.

technical perfection the present work combines a deep insight into the manifold and difficult problems of this most important branch of the law. The result has been a work which is probably unique in the history of legal literature.

A detailed review will appear in this *Journal* after the second and concluding volume is published.

E. J. COHN.

Chronological Table and Index to the Statutes.—The last edition of the Chronological Table and Index to the Statutes, which has recently been published by His Majesty's Stationery Office, will be more warmly welcomed than usual by the legal profession, in view of its greatly decreased cost. The price is now 25s. for the two volumes, instead of the former price of £3 16s. An indispensable work, such as this is, should be within the reach of those for whose benefit it is published, and there is little doubt that the wisdom of reducing the cost by more than two-thirds will be reflected in increased sales. Hitherto the volumes have been obtainable separately, but they are now sold together. The work has been issued annually since 1898 and is invaluable as an accurate guide to the Public General Acts of this country. Without it considerable difficulty would be experienced in keeping up-to-date with the many changes made in the law by the almost continuous amending and consolidating legislation passed during recent years.

The learned editor, Dr. Cecil T. Carr, who has been responsible for the work since 1923, introduced a notable improvement in the arrangement of the Chronological Table in 1929, when the information contained therein was arranged in two columns instead of three, as had been the case in previous editions.

The labour involved in the revision of the work from year to year must be enormous; and although errors have been known to creep in from time to time, it is not for long that they have escaped the vigilance of the editor and his staff, who are to be congratulated upon the very high standard of accuracy secured.

With such outstanding efficiency at the disposal of the Statute Law Committee, is it too much to hope that time may be found to compile a revised and up-to-date edition of the Index to the Local and Personal Acts? The last published covers the period from 1801 to 1899.

H. A. C. S.

American Journal of International Law.—In the July number Dr. Baty, writing with his customary liveliness, vigorously condemns the confusion now prevalent in the use of the words "recognition" and "war," and insists that our first duty is to make our use of these words correspond to realities. Mr. J. H. Spencer discusses the reference to the Monroe Doctrine in the League Covenant, and comes to the conclusion that Article 21 is "a juridical anomaly," an attempt to legislate in disregard of a juridical reality. An article by Professor Steiner seeks to

analyse the basic legal principles underlying the decisions of the Permanent Court, and Professor Fairman discusses the very difficult problem of determining to what extent States can contract international liabilities notwithstanding internal limitations upon the powers of their representatives. Professor Hudson, whose knowledge of the work of the Permanent Court could not easily be surpassed, contributes an article explaining the new rules of procedure adopted this year. H. A. S.

Proceedings of the Canadian Bar Association.—As usual there is a lot of good reading in the annual volume.¹ The Canadian Bar Association has rendered for twenty years notable service to Canada as well as to Canadian lawyers. It brings together lawyers from all parts of that great country, as well as representatives from Great Britain and the United States. Canadian hospitality is famous, and the spirit of goodwill which prevails at these gatherings does not end with the meeting. At this meeting, held in August at Winnipeg, the principal guest from this country was Sir Boyd Merriman, whose address was on the history of the Admiralty Court. Among other valuable papers we may note that by Dean V. C. Macdonald, of Dalhousie University, on the law of negligence, especially interesting as to the Model Contributory Negligence Act, and that by Mr. Arthur Vallée, K.C., on the Duplication of Accident and Insurance Indemnities. F. P. W.

¹ Vol. xx (1935).

NOTICES OF BOOKS.

ANCIENT LAWS AND MODERN THEORIES.

Two books have recently appeared which in different ways require very serious consideration by students of Jurisprudence, and in particular by those who adopt an historical or comparative approach. They are Mr. A. S. Diamond's *Primitive Law*¹ and *The Assyrian Laws* by Mr. G. R. Driver and Sir John Miles.² These two books stand in a definite relation, both to one another and to the work of Sir Henry Maine; and, in some respects, it is a little unfortunate that Mr. Diamond did not have the opportunity of considering *The Assyrian Laws* before his own work appeared. *Primitive Law* will be considered first, because it propounds a general theory into which, if it be accepted, *The Assyrian Laws* would have to be fitted.

Ancient Law appeared in 1861, and the fact that jurists and legal historians still enthusiastically discuss the hypotheses upon which it is built is in itself a proof of the importance of Maine's work. It was quickly recognized as one of the turning-points of English legal thought, and it is perhaps significant that the impulse given by it to legal studies in general was supplied by a man who was not a professional lawyer. Maine exposed himself to criticism in two rather obvious ways, however. In the first place, he wrote without footnotes—a practice which only a person of his eminence could adopt, even when it is remembered that *Ancient Law* is simply a collection of lectures. Secondly, he put forward his conclusions in general terms which had the appearance of finality. It is for this reason that he has sometimes been seriously misunderstood. Maine's conclusions are based chiefly upon an analysis of three legal systems—the Roman, the English and the Hindu. There are, indeed, embodied in his works, considerations of particular aspects of other systems, but the approach is tentative. At the time when Maine wrote, he was taking an unusually wide view of the field of law—so wide, indeed, that it will be remembered that the Austinians doubted whether much of what he discussed could properly be regarded as law at all. In these circumstances it was natural that he should state general conclusions

¹ *Primitive Law*, by A. S. Diamond, M.A., LL.M. (London: Longmans, Green & Co.) Pp. x + 451. 25s. net.

² *The Assyrian Laws*, by G. R. Driver, M.A., and John C. Miles, Kt., M.A. (London: Sir Humphrey Milford, Oxford University Press.) Pp. xxiv + 534. 35s. net.

upon all the evidence then known to him, and it would indeed have been paradoxical if the founder of Historical Jurisprudence in England had considered that his hypotheses possessed a validity for all time. It is common knowledge that Maine wrote before the science of Anthropology was developed, before excavations in the Near East had revealed to us traces of vanished legal civilizations as complex, and as important in the general history of civilization, as those of Rome, before Oriental systems other than those of India had become the subject of scientific inquiry, or (to come nearer home) even before the modern school of Anglo-American Legal History had begun its labours. No one would have welcomed these developments more cordially than Maine himself, and if wider knowledge had compelled him to abandon some of his assumptions, there can be little doubt that he would have done so cheerfully, recognizing in that a further proof of his fundamental conception of law as a growth, shaped by definite basic conditions. After all, it is the method of Maine which is of major importance, and not the conclusions.

These considerations spring rather forcibly to the mind in considering Mr. Diamond's courageous work. He attacks Maine's conclusions with all the vigour of a contemporary, yet in doing so, he applies a technique which owes a good deal to his renowned adversary. Mr. Diamond is, however, a firm believer in the frontal attack. There is an excellent illustration of this in the downright assertion on p. 162, in considering Maine's theory of the relation of law to religion, that "Maine failed to notice the nature of the documents before him, and substituted for conclusions founded on evidence a theory which, leaving aside the past, is wanting in any analysis even of modern religion, morality and law." Quite a lot of people have applied Maine's theory to systems examined by them; some have followed Maine, and others have disagreed. No one, for example, who sought to apply it to Chinese law would meet with any success; but Maine did not consider Chinese law, because the materials were lacking. To criticize Maine properly, you must examine the evidence upon which Maine himself worked, and even though there are no footnotes, there are innumerable clues in the lectures themselves.

Leaving particular considerations on one side, it is necessary to consider the nature and scope of Mr. Diamond's own theory. It is an exceedingly comprehensive theory, but it is none the worse for that. Some jurists tend to be too rigidly confined by their material, forgetting perhaps that the really great jurists, like the really great generals, are not those who swallow the most text-books, but those who judiciously enliven their studies by a little imagination. The doubts which immediately arise to the mind concerning Mr. Diamond's theory, however, are exactly those which occurred to others in dealing with Maine. The theory may fit the evidence as we now possess it, but does it therefore follow that it is any more valid than Maine's was on more limited evidence? A few fresh excavations in Crete or Egypt or Mesopotamia may necessitate very considerable modifications. A yet more serious consideration, however,

is that where several explanations of known legal phenomena exist Mr. Diamond may have chosen that explanation which supports his theory and have ignored the others. Thus, in his chapter on The Code of Manu, Mr. Diamond, after referring to the feudal period in China, and the emergence of Confucianism at the end of it, says¹: "As for the philosophical literature of China, there is good, ancient authority for the proposition that the philosophical school which is closest to the law—namely, that which is called the School of Law—was a development out of the normal, secular law." This comprehensive statement is misleading from several points of view. It implies that the School of Law was the product of normal development, whilst, as M. Duyvendak (not M. Ruyvendak, as Mr. Diamond calls him) is at pains to point out,² the School of Law represented a break with the traditional philosophical outlook of China, and was the product of a temporary reaction against prevailing disorder due to the decay of feudalism, whilst as to the subsequent influence of the School of Law, that eminent authority writes³:

While profiting from its work, China has rejected the doctrines of the Law School. The gulf between law and ethics, created by the Law School, was bridged by again restricting law to merely penal law, containing sanctions on the observance of the recognised rules and customs. Law became again firmly embedded in ethics; it never acquired authority as an independently regulating norm of conduct. Down to the most modern times measures in imperial mandates were justified by invoking the natural moral law; the standard of conduct was *li*, not *fa*, the state-law. The crude attempts of the School of Law to regulate life by man-made law has scared the Chinese mind away from attempts in that direction, even from codification of the existing customary law, from any other point of view than that of the penal.

Looked at in this light, Mr. Diamond's observations on Chinese legal development in relation to the Code of Manu lose a good deal of their point. Indeed, it would have been better to leave China out of the argument altogether, unless the author was prepared to explain the peculiar philosophical theories upon which Chinese law rests. That would have required a good deal of patient study, and if Mr. Diamond's references to Chinese law are a little unhappy, it is because the necessary preliminary work has not yet been done, at any rate in a European language.

The fact of the matter is that although Mr. Diamond's theory is sufficiently comprehensive to have many attractions, its very comprehensiveness makes it inevitable that it should be based upon an oversimplification of the vast material that is now available for investigation. The central point of Mr. Diamond's theory is that from the material we now have, it is possible to trace the development of all law through certain clearly defined periods of evolution; for example, through the periods of the First and Second Hunters, through three Agricultural Grades, and two Pastoral Grades, until finally it emerges into the period of

¹ P. 132.² *The Book of Lord Shang*.³ P. 128.

the Codes, where, again, it is possible to classify the existing material into Early Codes, Early Middle Codes, Middle Middle Codes and Late Codes. Mr. Diamond offers a classification of most of the codes we now possess, and derives some striking and provocative conclusions from that classification. It is evident, however, that a good deal of the value of his conclusions will depend upon the extent to which, even assuming the correctness of his classifications, the respective codes have been subject to or free from external influences, but whilst Mr. Diamond does not ignore this factor,¹ he does not seem to give it adequate consideration; and in order to fit English law into his hypothesis, he is compelled to assume (1) that the Anglo-Saxons of the early days of the Saxon conquest were in the Third Agricultural Grade²; (2) that the Laws of Æthelberht can be classified among the Early Codes³; (3) that the Laws of Wihtred and his successors are Early Middle Codes; (4) that English Law about A.D. 1075 was in the period of the Middle Middle Codes; (5) that a century later it had passed into the period of the Late Middle Codes (where it is found in association with the Pentateuch and the Twelve Tables); and (6) that English Law passed into the period of the Late Codes (where it is equated with the Assyrian Laws, the Sumerian fragments and the Code of Hammurabi) between A.D. 1220-50.⁴ This, if accepted, would be a remarkably swift process of development which could only be explained either by overwhelming foreign influence or by a legal genius so profound that our neglect of the laws of other nations would be entirely laudable; for it is worth while remembering that of the fragments of Assyrian Laws discussed by Sir John Miles and Mr. Driver, some date from c. 2169-1870 B.C., others from 1450-1250 B.C., and even if Mr. Diamond is only including the latter in his period of Late Codes, and would assign the Old Assyrian Laws to some other division, the interval between them is much more considerable than that which exists between his divisions of Mediæval English Law, whilst Messrs. Miles and Driver regard the Assyrian Laws as a good deal more primitive than Hammurabi's. Does not the possibility arise that Mr. Diamond is seeing one of the two systems a little out of focus?

To raise questions of this kind, however, is not to dismiss the theory. It is backed up by a formidable assembly of authority, and it has the strength of logical consistency. Mr. Diamond is never afraid of the implications of his speculations. He forces them to their ultimate conclusions. Moreover, he is in line with those jurists and sociologists who still believe that certain laws of universal application condition human progress from earliest times; and Mr. Diamond will have done good service if he has disturbed the complacency of those who regarded Maine's conclusions as possessing eternal validity.

Some will be equally disturbed, though in different fashion, by Miles and Driver. Possibly they will enjoy some of the sensations of Rip Van Winkle, upon reading in the Preface:

¹ P. 175.² P. 183.³ P. 179.⁴ P. 179.

The object of the present work is, on the one hand, to provide a text and translation of the Assyrian Laws with philological notes and glossaries for the use of Assyriologists and, on the other hand, to enable students of the Old Testament and of comparative law to make use of the information which may be extracted from them. . . . If then it is well received, they hope to proceed to the study of the Code of Hammurabi and of the other fragments of Babylonian law and of the Hebrew Laws embedded in the Pentateuch.

Assyrian Laws, Hammurabi, and the Pentateuch, equipped with an elaborate apparatus of textual criticism and engaging the attention of distinguished legal scholars! That is indeed a revolution. However, the fact remains that at length a happy collaboration between Assyriologist and jurist has produced exactly the volume for which we have been waiting, and the serious study by English lawyers of the vast collections of legal tablets recovered from Mesopotamia may now be said to have begun. We are a little late in the field, for Cuq, Kohler, Koschaker, and San Niccolo (to mention only a few of the most outstanding names) have already done a good deal to communicate the nature and scope of Babylonian and Assyrian law to the modern world, and the literature is already extensive. It may be that the fact that the Babylonians were a methodical people who chose to record every important transaction upon clay tablets will ultimately prove the most significant circumstance in legal history. It is already clear that our enthusiasm for the legal wisdom of the Romans must be restrained a little, for they were the heirs of an unsuspectedly stable legal civilization, the influence of which upon the commercial life of the ancient world it is hard to exaggerate; and in an age when comparative law is beginning to absorb the energies of lawyers of many varying outlooks, an attempt to discover the origins of well-known institutions in the legal remains of the oldest civilization so far known to us is obviously of importance. Comparisons of legal institutions lose a good deal of their value unless the conditions under which those institutions have developed in each community are given due weight; and as far as commercial law is concerned, once an investigation into origins is undertaken, you are led ultimately to Babylon and ancient Sumer. The proper starting-point of comparative jurisprudence, that is to say, is Babylonian law.

In the present work, however, the distinguished authors are not concerned with mercantile laws, but with the Assyrian family and social laws, in so far as they have survived. With the exception of the Old Assyrian fragments, which are very imperfect, they are some six hundred years later in date than Hammurabi's great Code, and they reflect a very different organization of society from that of the wealthy and highly organized empire of the time of the first dynasty of Babylon. By the side of the Babylonian Code, these Assyrian laws seem harsh and primitive, and one is tempted to suggest that they represent an order of society which is intrinsically Semitic, and which, owing to Sumerian influence, had already broken down among the Akkadians at the period when they

invaded Babylon. At any rate, it is observable that those portions of the Babylonian Code which apply to the Semitic invaders are substantially harsher than those prevailing among the conquered—a circumstance which in itself points to the immense antiquity of Sumerian civilization.

The fragments of Middle Assyrian Laws which have survived are, from internal evidence, not all derived from the same document, and some parts of them could probably never have been part of any code. Thus, Tablet A is a collection of miscellaneous laws relating to offences by or against women, and to the property and rights of women. Professor Koschaker has already suggested that this fragment formed part of a *Rechtsbuch*, compiled from a number of different sources. In reaching this conclusion, Koschaker has applied to the text the methods adopted for the study of Justinian's *Digest*, with the object of discovering interpolations, and this method has yielded striking results. The present authors, however, adopt the alternative view that the compilation was that of a legislator who wished to amend the existing law relating to women, and they suggest that the law which was to be amended was either the Code of Hammurabi or a body of laws of Assyrian origin based on laws or customs which themselves formed the basis of Hammurabi's Code. Both views have a good deal to commend them, and the suggestion that these fragments really set limits to the extent of the penetration of Assyria by Babylonian law is distinctly interesting. In view, however, of the well-known fondness of Assyrian and Babylonian scribes for making methodical compilations of rules on particular topics, it is probable that Koschaker's view will continue to hold the field.¹

The authors use the texts which they have translated as the starting-point of comparative studies into the customs of the peoples of the Ancient East. Perhaps the most interesting of these discussions is that relating to the levirate as a product of the desire of ancient peoples to ensure the continuance of the family, and thus of the ancestral property and the ancestral cult. After an illuminating discussion of the levirate in Hebrew law, the authors reach the conclusion that the slight importance of this custom in Babylonian and Assyrian law is due to the wide use which is made of adoption and legitimation with a similar object.

Included among the Middle Assyrian Laws is one which prescribes the procedure to be followed on the sale of land, its object being to secure publicity of transfer. This is an essential requirement, inasmuch as members of the family or neighbours may have a right of pre-emption or redemption, and it is essential that their claims should be extinguished if the purchaser's position is to remain undisturbed. When a sale was contemplated, a proclamation of it was made, and those with claims could then come forward and enforce them by taking possession of the land. If, however, after three proclamations within a month no one stepped forward, then, and only then, a binding sale could be effected.

¹ Professor Koschaker regards the suggestion that the laws modified by Tablet were the Code of Hammurabi as "entirely improbable." 52 L.Q.R. p. 426.

Many difficulties in connexion with this procedure remain to be solved, some of them fundamental. For example, Koschaker is of opinion that it occurred only after a completed sale, when the property had been transferred, and the price paid. The foundation for this view is his supposition that an executory contract for sale was not recognized in Assyria. On this supposition, the procedure was elaborated for the protection of a title already acquired. The present authors, however, advance arguments in favour of the hypothesis that the transaction preceding what is described in the text is simply an agreement to sell, so that no title had passed, and the price had not been paid.

When texts such as these have been submitted to patient analysis by experts of the standing of the present authors, it is apparent that many theories will be propounded from which other commentators will differ, but upon which only experts may presume to offer an opinion. Moreover, it is possible that some of the issues, as in Roman Law, are not capable of final solution to-day. Nevertheless, the lawyer who is not an expert Assyriologist may appreciate the importance of what is being done. New territory is slowly being won for jurisprudence, and when the pioneers have cleared the way, the army will be free to march in and take possession. Meanwhile, the more who can be persuaded to devote their energies towards the elucidation of some of the major problems of the legal history of the Ancient East, the better for all of us, for there is more than sufficient material for many generations of investigators.

GEORGE W. KEETON.

THE AUSTRALIAN CONSTITUTION.

HIGH as is the competence of the justices of the High Court of Australia, it must be admitted that brevity has never marked their judgments, and a hearty welcome is therefore due to the digest of Constitutional Law in the *Australian Digest*, 1825-1933¹ by Mr. W. J. Dignam. How great is the complication created by a federal constitution is shown in the mere form of the Digest. Constitutional law apart from the Commonwealth of Australia Constitution Act is digested in thirty-four columns, the issues under the Act take up 192, and there remain to be treated separately the cases, numerous and important, concerning the High Court and Federal Judiciary, Industrial Law—the conciliation and arbitration issue, Parliament and the Public Service. Every effort has been made to give a clear and accurate account of the points decided in the cases digested, and the degree of success achieved is very creditable, for nothing is more difficult than to attain precision in these complicated questions. The only real omission is one which forms part of the system of the Digest. There is no system of reference under the cases to later cases by which

¹ *The Australian Digest*, 1825-1933. Editor-in-chief, B. Sugerman. Vol. IV, Compensation to Costs. (Sydney: Law Book Co. of Australasia, Ltd. London: Sweet & Maxwell, Ltd., 1935.) Pp. lx + columns 1303. £2 15s.

they are modified or overruled. Thus the decision which denied the power of the Commonwealth to affect State railways as instrumentalities of the States is duly set out (col. 85), and only at col. 92 is the fact that that case was definitely overruled in the *Engineer's Case*¹ recorded. It is, of course, clear that to note the effect of later cases would have added considerably to the bulk of the work, but it might have been well to do so in all cases of formal overruling or serious criticism. Of the other contents in the volume that of Mr. Sugerman on Contracts will be found of general interest as both satisfactorily arranged and lucid.

A valuable successor to the late Dr. Kerr's treatise on the constitutional law of Australia is provided by Dr. Wynes,² though he confines his attention to legislative and executive powers, to the exclusion of the judicial power except in regard to questions affecting the rights of the Commonwealth and States *inter se*. The work is sound and useful; it is brought up to the very end of 1935, and it testifies throughout to the careful study of authorities and the exercise of sober judgment on the many controversial issues not covered by final judicial authority. His view (pp. 302-7) that s. 92 of the Constitution applies to the Commonwealth as well as the States has now the authority of the Privy Council, but the terms of that judgment³ do not support his submission (pp. 288, 289) that *ex parte Nelson, Roughley v. New South Wales*, and the *Transport Cases* were wrongly decided.

Many points of general interest are dealt with. The author is strongly convinced of the indivisibility (pp. 337 ff.) of the Crown, simply ignoring the discordant view of the Union of South Africa. But without accepting divisibility, we must at least allow aspects, and, if *Williams v. Howarth*⁴ is quite legitimately cited, we must remember also the rule that no claim lies against the Crown in the United Kingdom in respect of transactions relative to other aspects of the Crown,⁵ and the rule of the Conflict of Laws under which English courts will not enforce taxation claims by the Crown in a Dominion.⁶ Dr. Wynes is also critical of the doctrine which ascribes full international personality to the Dominions, which he holds to be incompatible with common allegiance and the legal supremacy of the British Parliament. But common allegiance and the now formal supremacy of Parliament can hardly be treated as decisive of the present status. Dr. Wynes like many others does not much admire the Statute of Westminster which the Commonwealth has refused so far to make effective. We may admit at any rate that s. 3 concerning extraterritorial legislative power is quite unsatisfactory. The combined legal talent

¹ (1920) 28 C.L.R. 129.

² *Legislative and Executive Powers in Australia*. By W. Anstey Wynes, LL.D. (Sydney: Law Book Co. of Australasia, Ltd. London: Sweet & Maxwell, Ltd., 1936.) Pp. xxviii + 396. £1 12s. 6d.

³ *James v. Commonwealth of Australia*, 52 T.L.R. 696.

⁴ [1905] A.C. 551.

⁵ Keith, *Constitutional Law of the British Dominions*, p. 143.

⁶ Dicey and Keith, *Conflict of Laws* (Ed. 5), p. 212.

of the governments of the Empire should have been capable of defining the powers of the Dominions, and the respect due to their exercise in the rest of the Commonwealth, in intelligible terms, instead of throwing on the courts the burden of making the section have a meaning. In one respect, however, the author (p. 65) is open to correction. International law does not impose the restrictions as to extraterritorial legislation normally observed by the British Parliament; this is a case in which the United Kingdom and the United States are far more reserved in the use of their powers than are other States.¹ Whether the Commonwealth can under the power as to external affairs (pp. 208, 209) invade through treaty-making the sphere of the States must remain very doubtful; even if the Privy Council should uphold this power for Canada, the difference in wording between the constitutions would cause difficulties. Moreover the soundness of the principle of intervention is very doubtful. It means the subjecting of State authority to intervention by a federal authority which has no responsibility for the effect of its action. At any rate this novel doctrine means a very great change in the distribution of power on the strength of which federation was entered into. It is consistent with this that Dr. Wynes believes (p. 364) that the power of amendment of the Constitution extends to the destruction of its federal character; this seems very dubious and the contrary view commended itself to the Joint Select Committee which rejected the plea of Western Australia to be permitted to secede from the Commonwealth. The author seems (p. 61) to have some doubt whether s. 39 (2) (a) of the Judiciary Act, purporting to prevent appeals to the Privy Council from State courts exercising federal jurisdiction, is invalid. But, despite the views of the High Court in favour of its validity in the *Limerick Case*² and *Kreglinger's Case*,³ the matter is concluded by the authority of the Privy Council which in this issue has final authority; *Webb v. Outrim*⁴ involves the invalidity of the section, and in *Nadan v. R.*⁵ the Privy Council recognized this fact.

A. BERRIEDALE KEITH.

THE RESERVE POWERS OF THE CROWN.

It is very doubtful if Mr. Justice Evatt will find any support even in Australia for his argument⁶ in favour of the definition by law of the powers of the Crown in respect of the grant or refusal of a dissolution, the dismissal of ministers who command the support of a majority of the lower house, and the refusal of assent to legislation, and of the authority of the Prime Minister in regard to his colleagues. Even Professor Laski, whose doubts as to the constitutionality of the proceedings in 1931 are shared by Dr. Evatt, and who believes in definition, postulates that

¹ See Wharton, *International Law* (ed. Keith), i, 270 ff.

² (1924) 35 C.L.R. 69.

⁴ [1907] A.C. 81.

³ (1926) 37 C.L.R. 393.

⁵ [1926] A.C. 482, 494.

⁶ *The King and his Dominion Governors*. (London: Milford, 1936). Pp. xvi +

action must command the full and unfettered assent of political parties here and overseas, and such assent is at present quite out of the question. Moreover to give the enforcement of the rules to the ordinary courts would involve serious risk that judges would be chosen, or be believed to have been chosen, for readiness to help a political party, with consequent diminution of respect for their judgments. The alternative of creating a special tribunal is more attractive, but to constitute one satisfactorily would be very difficult.

Dr. Evatt's book, therefore, is chiefly of value as the reflections of a learned student of constitutional law, whose outlook is akin to that of the Australian Labour party. It is natural that he should view with disfavour¹ the dismissal of Mr. Lang, head of the New South Wales Labour government, by Sir P. Game. But the idea that the Governor was entitled to allow his Premier to defy the law of the Commonwealth by which both he and Mr. Lang were bound, when, as the general election which immediately followed proved, he was acting wholly contrary to the wishes of the people of the State, seems indefensible. Nor is it easy to understand Dr. Evatt's defence² of the Acting Governor of Tasmania, the Chief Justice, in assenting to an Appropriation Bill which the Council had refused to pass; there is no parallel for such illegality in Dominion history, and Australian lawyers of the highest standing forthwith condemned what had been done. Still less acceptable is his theory of the proper course of action in the case of Lord Byng in Canada in 1926.³ He suggests that, after refusing a dissolution to Mr. Mackenzie King, he should have refused the request of Mr. Meighen for a dissolution. But this ignores political realities. By forcing Mr. Mackenzie King to resign, Lord Byng placed himself in the hands of Mr. Meighen and could only accept his advice; no other course was open to him, for he could not be expected to humiliate himself by confessing to Mr. King that he improperly denied his request. His error lay in the fact that he refused a dissolution in circumstances in which it would have been granted by the King, and the Imperial Conference of 1926 made it clear that in future British practice should prevail, a point duly noted and acted on by Sir Isaac Isaacs in 1931.⁴ Dr. Evatt's attack⁵ on Professor Dicey's theory of the ultimate sanctions for the observation of constitutional conventions is ingenious but unconvincing, and in part it is vitiated by the unfortunate mistake of thinking that the House of Commons ordinarily does not meet between July and April.

While it is seldom possible to agree with Dr. Evatt's new views, it is satisfactory to find that he realizes the gravity of the decision of the Imperial Conference of 1930 to undermine the independence of the Governor-General by making him the nominee of the Dominion ministry, with its inevitable sequel, his removal at the pleasure of that government.

¹ Pp. 157-74.

² Pp. 178-84.

³ Pp. 55-64.

⁴ Keith, *Constitutional Law of the British Dominions*, p. 150.

⁵ Pp. 111-20.

Mr. de Valera has stressed the same point in announcing his determination to make the office elective,¹ and the Union of South Africa has placed the Governor-General in the position to exercise every external and internal power of the Crown without regard to the royal wishes. It is the weakening of the position of the Governor-General which gives some ground for seeking to define his powers. But that is doubtless impossible, and the Commonwealth government has chosen in its recent selection a Governor-General whose status gives reasonable prospect of his due independence.

A. BERRIEDALE KEITH.

FEDERALISM IN GOVERNMENT.

THE Andhra University, though a late-comer among Indian Universities, has already produced much useful work in many spheres, and its reputation is duly maintained in Mr. Venkatarangaiya's study of federal governments with special reference to federalism in India.² The author has studied carefully recent literature, and, if he has not much that is new to say, there is no doubt that his work will prove very useful to Indian students and politicians, who so far have been accustomed to a form of government which is essentially unitary. The most interesting part of his work for the general reader is Chapter X, in which he discusses the fundamental features of the scheme now embodied in the Government of India Act, 1935. He seems to underestimate the scope for true Parliamentary government introduced into the Provinces when he insists that there is still dyarchy (p. 199) and that "the government of the Province will literally be the government by the Governor" (p. 194). No doubt the communal character of the electorates and the provision for minority representation must hamper the development of strong ministries, and must give the Governors opportunities of asserting their reserved powers; but the way is made open under the new Constitution as it was not under the Government of India Act, 1919, for the emergence, at least in some of the Provinces, of true responsible government. On the other hand, it may be admitted that the federal system is dominated by the desire to establish a conservative administration and legislature in which British, Muslim and Indian State interests will be safeguarded against the possibility of responsible government controlled by a Hindu majority. Mr. Venkatarangaiya is also right in holding that most of the States of importance will be able to dictate to the Crown the terms on which they will adhere to the federation (p. 190). He seems, however, to hope that the power of paramountcy may be available to keep the States in line with the federation in such matters as factories, welfare of labour, trade unions, and the regulation of industrial disputes, all matters excluded from federal power as regards the States. But it must be remembered that it is precisely in these matters that paramountcy has least scope for

¹ Keith, *Letters on Imperial and International Problems*, 1935-36, pp. 58, 59.

² *Federalism in Government*. Andhra University Series No. 12. (Waltair, 1935.) Pp. viii + 215. Rs. 2.

application ; the Crown has not claimed in the past, and cannot properly now claim, to dictate to the States policy in industrial matters. The question will assume ultimately great importance in regard to the issue of extending conventions framed under the auspices of the Labour Organization of the League of Nations to India. The author supports the view, which has been rejected, that a second chamber is unnecessary in a federation (pp. 32-9), and he probably underestimates the extent of the complication which will be introduced into India by the separation of powers between province and centre ; these issues have become more rather than less complex in the United States, Canada and the Commonwealth of Australia with the passage of time and the emergence of modern economic conditions which come into sharp conflict with territorial boundaries. It may be added that it is a mistake to regard the English of South Africa as concentrated mostly in Natal ; it is in the Cape that the British elements have exercised their most characteristic influence on South African political action and thought, and so far is the French group in Canada from being restricted practically to Quebec (p. 51) that very serious issues have been created by their settlements in Manitoba and Ontario, and they are becoming an element of increasing importance in every part of the Dominion.

Mr. K. V. Punnaiah's study¹ of the system of federation which is to become operative in India under the Government of India Act, 1935, has substantial value as a clear exposition of the forces which have co-operated in producing that remarkable scheme. He points out the parts played by British imperialism, the interests of the States, the communal demands of the Muhammadans, and Hindu nationalism with a commendable desire to be fair. He sees (p. 204) that the fundamental difficulty which has resulted in the present form of constitution is to be found in the failure of Hindus and Muslims to work together, which prevents the development of normal parties, the indispensable basis of responsible government. He recognizes also that it was the insistence of Indian Liberals on the grant of responsibility at the centre, against the unanimous advice of the Simon Commission, which resulted (p. 59) in their acceptance of federation, when they found that the British Government would not concede responsibility on any other condition. He admits (p. 197) that the result of the working of the present system of the federation must develop into a federal government virtually irresponsible, and that the States possess an effective veto on any suggestion to transfer the reserved subjects to the control of the federal ministry (p. 202). But in his view (p. 192) the future will tend to justify the policy of Sir Tej Bahadur Sapru ; federation is a necessary prelude to Dominion status, the division of powers between federation and units is necessary, the system will serve to reduce communal friction and by bringing the Princes into contact with British India will pave the way for true nationalism. His

¹ *India as a Federation*. By K. V. Punnaiah. (Madras : Paul, 1936.) Pp. 228. Rs. 3.8.

hope no doubt is based on long views, involving the belief that the movement for democracy must gradually have effect on the States and communal feeling will diminish in favour of co-operation for common ends. His one specific remedy for immediate difficulties is a plea for the abandonment of the dependence of the ministry on the vote of the lower house. It should be elected for each Parliament, as was originally contemplated by Mr. Montagu and Lord Chelmsford, with the result that it would work by compromise and less encouragement be given to political intrigue. For this suggestion there is unquestionably much to be said.

A. BERRIEDALE KEITH.

THE STAIR SOCIETY.

WE welcome this first volume of the newly-formed Stair Society,¹ the object of which, like the object of its English elder brother the Selden Society, is "to encourage the study and advance the knowledge of the history of Scots Law by the publication of original documents and by the reprinting and editing of works of sufficient rarity or importance." This volume gives us a comprehensive survey of the sources of Scots Law—the first we are told that has ever been attempted. Because it is the first survey, "it does not profess to be either exhaustive or final"; but it shows that the materials for the study of the history of Scots Law, though not so abundant as the materials for the study of the history of English Law, are sufficiently abundant to furnish many volumes.

The survey is certainly comprehensive. It consists of thirty-eight chapters, which are classified under the four heads of Native Sources, Non-native Sources, Indirect Sources, and Special Subjects. Each chapter contains a list of the sources in print or in MS. which fall within its scope, and a commentary on those sources. To English lawyers some of the most interesting chapters will be those on the history of the Statutory Law, on the Practicks, on the Institutional Writers, on the Regiam Majestatem and the Auld Lawes, on the Influence of Roman Law, on Feudal Law, on the Influence of English Law, on French and Dutch Influences, on the Style Books, on Constitutional Law and History, on the Criminal Law, on Judicial Administration in Session and Justiciary, on the relation of Equity to Law—a matter discussed in the chapter on the Law of Nature, which was the subject of a correspondence between Lord Kames and Lord Hardwicke to which some reference should have been made. These chapters will be the most interesting partly because they deal with sources of law which, though in many cases common to the legal history of both countries, are in their character and development often fundamentally different; and partly because they deal with sources and influences which have no counterpart in England. They will enlarge the range of the English lawyer's vision, and teach him that the

¹ *An Introductory Survey of the Sources and Literature of Scots Law.* By various authors, with an Introduction by Lord Macmillan. *The Stair Society*, Vol. I. (Robert Maclehose & Co., Ltd.) Pp. 465 + xv.

results reached by the history and development of his own system were not the only possible, and sometimes not the best, solutions of the problems set to a legal system by the political, social and economic development of the State.

There are many other topics dealt with in this survey. There is an account of many different classes of Scottish Records, of the Law Merchant, of Charters and Cartularies, of Admiralty and Maritime Law, of International Law, Peerage Law, Celtic Law, Heraldic Law, and Jurisprudence. Some of the most interesting chapters are on the Canon Law and the ecclesiastical courts. Those courts exercised a larger jurisdiction in medieval Scotland than they were permitted to exercise in medieval England; and the fate of the Canon Law in Scotland after the Reformation presents some similarities and some contrasts with its fate in England. There is an interesting chapter on the influence of the law of Moses; but it would I think be even more interesting to trace the influence of the Calvinistic theology on the Scottish legal system and on the mental outlook of Scottish lawyers. The chapter on the Udal Law of the Orkney and Shetland islands gives us a glimpse of a very different body of law. It is the more interesting because, as Lord Macmillan has pointed out in his Introduction, these islands and the law governing them became part of the kingdom of Scotland and Scottish law as the result of the forfeiture of a pledge—a method of acquisition unique in international law.

This account of the contents of this volume proves its comprehensiveness; and where it refers to English Law its statements are generally accurate. Indeed I have noticed only one serious error—a statement at p. 189 that the doctrine of consideration “probably came from Normandy.” Its one serious defect is that it lacks an index. In this matter the example of the Selden Society should be followed; for to publish a law book without an index is very nearly criminal.

In conclusion I should like to say a word or two upon the very great benefits which will be conferred upon the legal history of Great Britain if the programme of the Stair Society is carried out. If that programme is carried out the history both of Scots and of English Law will be elucidated by the discussion of the reasons for the points of similarity and dissimilarity in their development and in their resulting doctrines. Because there are many points of resemblance between the two systems at different stages of their history, and many points of contrast, the parallels which the work of the Stair Society will enable us to draw will be peculiarly fruitful. In the days before Edward I's reign the two systems of law came very close together. Then came the centuries of intermittent war; and because those centuries were for Scotland centuries when the “overmighty subject” held sway, no centralized judicial system was able, as in England, to develop a common law. Therefore Scotland, like many other European countries, experienced, in the sixteenth century, a Reception of Roman Law. When, helped by that Reception,

she developed a well-defined and native system of law, that system differed fundamentally from the English system ; and the mental outlook of English and Scottish lawyers came to be equally different. As Lord Macmillan has said (L.Q.R. xlviii 482), " the formulary system and the fictions of the English common law, the outcome of pure empiricism, find no counterpart in the history of the law of Scotland. In Scotland the search was not for the appropriate form of writ, but for the legal principle involved." Thus, for example, the earlier history of Scots Law had the result of giving to feudal ideas a larger share in shaping the land law than they had in England, and a longer life. It was not till the beginning of the sixteenth century that the royal courts began to encroach upon the jurisdiction of the feudal courts in cases concerning land tenure ; and it was not till 1747 that such feudal incidents as ward and marriage disappeared. Again, on such fundamental matters as the law of civil and criminal procedure, on the relation of equity to law, on the law of contract, on the law of marriage, on the law of succession to moveables, the two systems were wholly different. Scottish Law again differed from English Law in the relative importance attached to decided cases and institutional treatises as sources of law. Thus when the Act of Union was passed in 1707 the two systems were very far apart. The period since 1707 has been a period in which the two systems, while retaining their national characters, have approximated more closely to one another. That approximation was the inevitable result of a common Legislature and a common final Court of Appeal.

The results of that approximation have been beneficial to both countries. Each has learned something from the other. If in the eighteenth century English influence helped to abolish the use of torture, if it helped to build up a system of commercial and maritime law, Scotland had something to give in return. Because Scots Law had been influenced by Roman Law it was in closer touch with continental legal developments than English Law. For that reason it was saved from the failures of justice which were often caused by the differences between the forms of action and the system of special pleading ; and its law of bankruptcy was much superior to that of England. Though in the eighteenth century the system of trial by jury was not worked so intelligently in Scotland as it was in England, there were other matters in which the law of Scotland was superior to that of England. In Scotland a prisoner was not refused the aid of counsel, and that scrupulous adherence to words and forms, which was for so long a blot on English criminal procedure, was unknown. Each system has made its contribution to the law of Great Britain ; and there is no doubt that the existence of these two systems of law has helped the Legislature to reform the laws of both countries.

What the Act of Union has done for the law of the two countries we all hope that the Stair Society will, in conjunction with the Selden Society, do for the history of English and Scots Law. We hope that, by the comparisons which it will enable English and Scottish lawyers to

make between the sometimes similar and sometimes divergent courses which the legal development of the two countries has pursued, a fuller and a more accurate account of the legal history of both countries will be made possible.

W. S. HOLDSWORTH.

BEFORE THE WAR.

THIS volume¹ carries the diplomatic story roughly from the years 1901 to 1911, and is in effect a study of five men, Lansdowne, Delcassé, Bülow, Isvolski and Aehrenthal. G. H. Lewes wrote the *Biographical History of Philosophy* and our author essays to write the *Biographical History of Diplomacy*. The latter is the more difficult task, for a philosopher can create a new system while a diplomatist can rarely revolutionize an old one. Nor can our historian consider one statesman apart from another. As he says, "a certain amount of overlapping is inevitable," and, though all his five heroes "were men of ability, none of them were supermen." This fact marks the difficulty of the task, for, in that case, the men cannot be made to stand out against the background with the salient individuality of men like Canning or Palmerston, or Bismarck. Perhaps this fact makes the study the more suitable for this *Journal*. Dr. Gooch disclaims "moral indignation"; and assures us that our pre-War statesmen did not dream of renouncing war, and "cannot be classified into saints and sinners" in a world where Europe was "nothing but a geographical expression and there were no rules of the game."

If these premises are correct we could hardly expect war to be avoided in the end and, though our author does not commit himself, that appears to be his view. But it might have been worth while to estimate how the men who worked for the *status quo*, and how those who worked for change, defended their respective positions. It seems to me that occasionally one does get a flash of light on that. For instance on February 15, 1908, Aehrenthal told the British Ambassador "the policy of the two countries (Great Britain and Austria-Hungary) was different, ours (British) was idealistic and humanitarian, his was frankly realistic." It seems to me that Aehrenthal here recognized moral values, if he did not pursue them.² But, in such case, and at long last, morals come to their own. I think, just as in the case of a murder, there are some accomplices and one or two directly responsible. Ultimately I think this question will have to be answered by historians. Was the ultimatum to Serbia justifiable or not according to pre-War ethics?

In technical discussion our author carries great weight. Thus he discusses the testimony of Eckardstein and Lansdowne as to the initiation of the Anglo-German negotiations in 1901 and sums up against the latter (pp. 8-9), and I think his general handling of Lord Lansdowne the

¹ *Before the War*, Vol. I, The Grouping of the Powers. By G. P. Gooch, Litt.D., F.B.A. (London: Longmans, Green & Co.) Pp. 438. 10s.

² Gooch and Temperley: *British Documents on Origins of the War*, V, p. 340.

best thing in the book. He is a statesman on whom we desire more light, and who showed idealism particularly in Macedonia in 1905 as our author ably points out (p. 85). Excellent too is his account of the conversations of Delcassé with Radolin over the Anglo-French Entente (pp. 166-7). He also handles excellently the complicated story of the alleged offensive and defensive alliance of 1905 between England and France (pp. 175-7). And a page or two on the isolation of Spain (pp. 145-6) is one which could have been written only by one who had completely mastered the published sources. The pages on Bülow deal with a character who is better known but whom our author treats with considerable severity. "Under his guidance it (the sound Bismarckian tradition) was thrown to the winds" (p. 285). This is a weighty judgment.

The Bosnian and Tripoli crises are the only ones in this admirable series in which there are still unpublished materials (the Russian) not fully surveyed by the author. The whole is a most valuable contribution to the history of international policy by a master of the subject.

HAROLD TEMPERLEY.

STATUTORY INTERPRETATION.

THAT fine lawyer, the late J. G. Pease, last edited *Craies on Statute Law* in 1923. The new editor, Mr. Walter Scott, K.C., in bringing the book up to date,¹ has added references of special interest to students of comparative legislation, and has drawn upon the stores of learning accumulated in the *Law Quarterly Review*, *Harvard Law Review* and similar sources. The new volume conservatively follows the old plan. Even in the chapter on Subordinate Legislation there are few obvious changes, except the inevitable reference to Yaffé's case, though Mr. Scott has added in an appendix a brief summary of that neglected State document the *Report of the Committee on Ministers' Powers*. Craies founded his treatise on Hardcastle's *Statutory Law*. It needs no advertisement as a standard work on the construction, effect and operation of Statutes. It is not, of course, a guide to statutory drafting; for this kind of instruction it refers its readers to the pages of Thring and Ilbert, and to the more recent book by Sir Alison Russell. It cites, nevertheless, an agreeable diversity of judicial comment on the draftsman's labours. If certain facile generalizations make the draftsman the whipping-boy when something goes wrong in an Act of Parliament, they are cancelled out by other dicta, from judges not less eminent, fully recognizing his difficulties.

Our legislation is notoriously tangled. Anyone who wants an instance might examine a tedious episode in the regulation of milk and dairies. S. 28 of the Public Health (London) Act of 1891 was prospectively

¹ *Craies on Statute Law*. Fourth Edition. By W. S. Scott, K.C., LL.D., sometime Legislative Counsel to the Legislative Assembly of Alberta. (London: Sweet & Maxwell, Ltd., 1936). Pp. lv + 568. £1 17s. 6d. net.

repealed by an Act of 1914. The 1914 Act was postponed by an Act of 1915; another Act of 1915 consolidated the law of milk and dairies and repealed the already mentioned Acts of 1914 and 1915. The consolidating Act had a "press-the-button" clause, suspending its operation. An Act of 1922 postponed the consolidating Act, except in so far as the latter repealed the enactments of 1914 and 1915. By an order of the Minister of Health, the consolidating Act of 1915 was brought into force in 1922 so far as repealing those enactments of 1914 and 1915. The result is officially confessed in the Third Report of the Joint Committee for consideration of the consolidating Public Health (London) Bill which received the Royal Assent this year. "The effect of the order was to repeal the Act of 1914 before it in fact came into operation, and accordingly the enactments which were intended to be repealed by the Act of 1914 were never in fact repealed." So that, though Parliament meant to get rid of s. 28 of the 1891 Act, and embodied its contents in the Act of 1915, the section was still alive and had to be killed properly in 1936. Another conundrum of the operation of Statutes was raised by Sir Henry Theobald in 1930. The Road Traffic Act, 1930, had a not unusual clause postponing its commencement until such day or days as the Minister of Transport might appoint. When the first "appointed day" orders were made, Sir Henry propounded his riddle; if the Act was not yet operative, how could the Minister take action under it? S. 37 of the Interpretation Act did not seem to meet the case. The issue was never judicially settled, but the departmental authorities proceeded in quiet confidence that the intention of Parliament could not be nullified by these ingenious doubts. Mention of the intention of Parliament brings us back to a passage in *Craies on Statutes* where it is considered in another connexion. How far can the Parliamentary history of an enactment be judicially referred to in order to explain an obscurity? The recent editions of *Craies* have cited important examples of recourse to the tenor of speeches made by Ministers in introducing Bills. The point is of increasing importance since critics complain to-day that the intentions of the legislature are defeated by the too narrow constructions applied by the judges. Professor H. J. Laski's note, annexed to the report of the Committee on Ministers' Powers, voices the criticism and suggests possible remedies. Possibly Mr. Scott, who appreciates the rules in *Heydon's Case*, will elaborate this matter in his next edition. *Craies* makes it clear that the English rule forbids the courts to elucidate a statutory ambiguity by consulting those proceedings of the legislature which led to the passing of the Statute. The book continues to add that the same rule is followed in the United States—a statement which perhaps needs modification, though it would be rash to challenge so high an authority. The most erudite experts in statutory law are sure to find something still to learn in the pages of *Craies*. The new edition is worthy of its predecessors.

STEPHEN'S LAW OF EVIDENCE.

THIS famous digest of the English law of evidence is now so well enshrined in our legal system that it is the most natural thing in the world for judges faced with a difficult question on the law of evidence to turn to Stephen. Its diamond jubilee year has been celebrated by a new edition,¹ the twelfth, the last previous edition having been issued in 1925. The present editors, like their predecessors, have been careful not to alter the concise form and arrangement of this classic work, but to preserve unaltered all the articles which have been treated as authoritative. Necessarily there has been an increase in the number of cases cited, but all within reasonable limits, and it says a good deal for the pains taken that this edition is practically of the same size as the fifth edition of 1899.

One notes among the more recent decisions: *Berry v. Berry* ([1929] 2 K.B. 316), supporting the principle that the existence of any distinct subsequent oral agreement to rescind or modify any contract, grant or disposition of property may be proved by parol evidence, subject to the operation of equity (Judicature Consolidation Act, 1925, s. 44); *In re Davy* ([1935], P. 1), as to declarations concerning pedigree; *Homes v. Newman* ([1931] 2 Ch. 112), as to a declaration against interest; *Woolmington v. Director of Public Prosecutions* ([1935] A.C. 462), as to burden of proof when the commission of a crime is in issue; *Russell v. Russell* ([1924] A.C. 687), as to neither spouse being at liberty to give evidence of the absence of marital intercourse such as would tend to bastardize a child born in wedlock, though not all the cases in the Divorce Court which have limited the application of this much-disputed majority decision of the House of Lords are cited.

The rigidity of the English law of evidence, growing up as it did when jury cases on the civil, as well as the criminal, side were rather the rule than the exception as now, has no parallel in other legal systems, and therefore this classical work is of practical value only where the English common law prevails, though to any foreign lawyers who wish to study the English law of evidence it will serve as a sure guide.

W. L.

THE ANTI-DRUG CAMPAIGN.

IN its activities against the drug traffic over a period of fifteen years, the League of Nations has achieved results little short of remarkable. To have organized, on an effective basis, a world-wide campaign against the illicit traffic, is a performance which augurs well for the future of international administration. In building up its elaborate system for the control of the drug traffic, there is little doubt, too, that the League has made a permanent contribution towards the technique of international government.

¹ *A Digest of the Law of Evidence*. By the late Sir James Fitzjames Stephen, Bart., K.C.S.I., D.C.L. Twelfth Edition, by Sir Harry Lushington Stephen, Bart., Barrister-at-Law, and Lewis Frederick Sturge, Esq., Barrister-at-Law. (Macmillan & Co., Ltd.) 7s. 6d.

It is the aim of Mr. Bailey's book ¹ to describe and discuss this administrative system, and to estimate the value of the League's contribution. The result is a perfectly objective account of the League's work, which should be indispensable for experts on drug questions and valuable to all students of international affairs. The book begins with an excellent outline of the history of the problem before the War, and then goes on to contrast the meagre results of the Shanghai Commission of 1909 and the Hague Convention, 1912, with the work achieved by the League since its foundation. Then follows an account of the progress obtained with regard to opium smoking and allied problems in the Far East. The treatment of the Bangkok Agreement, 1931, and of the Far Eastern Inquiry which preceded it, might well have been expanded, for the relation between the two is not clearly brought out.

The author deals very adequately with the Geneva Convention of 1925, and the Convention of 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, and describes how the League successfully attacked the main problem which was to mark off the licit traffic from the illicit traffic, and to control in the strictest possible fashion the legitimate traffic so as to close all loopholes through which manufactured drugs could slip into the illicit trade. Chapter VI, which discusses the organs set up by the League to control the traffic, is exceedingly valuable and should be of particular interest to all students of international administration. The author might, however, have dealt at greater length with the Opium Advisory Committee (advisory organ on drug questions to the League Council) in view of the most important part which that body has always played in directing and carrying out the League's policy. Moreover, it might have been appropriate to add a fuller discussion of the embargo proceedings which the Permanent Central Opium Board may institute against Governments in certain cases where they have not fulfilled their obligations.

Interesting points clearly brought out are the universality of the Convention of 1931 (it has been ratified by over fifty States), the fact that the system is the first instance of a planned economy on a world-wide scale, and the possible application of the system to the international control of armaments. The author might perhaps have discussed an interesting juridical feature of the 1931 Convention, its application with respect to non-Parties, since this is certainly difficult to reconcile with the theory of continental jurists that the binding effect of International Law is based on the consent of States.

The book suffers a little from its emphasis here and there on technical questions, and a certain amount of judicious padding would have added more interest to the author's treatment of his material. Nevertheless, it is one of the best and fullest accounts so far of the League's campaign against the drug traffic.

J. S.

¹ *The Anti-Drug Campaign : An Experiment in International Control.* By S. H. Bailey. (London : P. S. King & Son, Ltd.) Pp. xiii + 264. 12s.

THE GOLD CLAUSE.

DR. PLESCH's book, *The Gold Clause*,¹ is a collection of twelve cases on the Gold Clause in money bonds decided by the courts of various countries, one case decided by the Permanent Court of International Justice, and the opinions upon Gold Clause questions of two eminent international lawyers, Professor Sauser-Hall and Professor Charles de Visscher.

Dr. Plesch, as he states in his introduction, has assembled these cases and opinions primarily for the purpose of showing that, "in the uniform opinion of the Courts and of the experts the Gold Value Clause still offers the protection without which a well-developed credit system could not exist." Whether or not we agree with this sweeping and somewhat dogmatic contention, Dr. Plesch's book is a useful selection of translations of the more important Gold Clause cases, some of which, though most valuable for reference, have not been easily available to the practitioner in this country. The absence of either an index of cases cited in the cases reported or of a subject index are omissions which, though easily remediable in future editions, are aggravating and must detract from the practical value of the present edition.

With the exception of the translations of the German cases which are halting and somewhat difficult to follow, the English translations are excellent.

The jurisprudence on the Gold Clause question is continually increasing; at least two cases which have come before the courts of this country, one of which is reported in this book, are likely to be brought before the House of Lords. Thus it is clear it will not be long before a further edition of Dr. Plesch's book will be necessary.

As Dr. Plesch points out in the closely reasoned and interesting introduction to his book, it is the Gold Value Clause which in the majority of cases has successfully made effective the intentions of the parties to a money bond. Is it not possible that the difficulties which have arisen, in the construction of contracts containing Gold Clauses by the courts of various countries, and which have given rise to a number of apparently conflicting decisions on this question, have been due to those who drafted the instruments in question? That is to say, though the parties to such bonds may have intended to safeguard creditors against currency depreciation, those responsible for the drafting of the contracts were possibly not aware of the distinction between a Gold Coin Clause, a Gold Bullion Clause, or a Gold Value Clause, and assumed that a "Gold Clause" would make effective the intention of the parties.

Though we may not entirely agree with Dr. Plesch's optimistic view, expressed in his introduction, of the importance of the Gold Clause to the future of international lending, his book is a valuable and practical compilation.

JOHN MATHIAS.

¹ By Dr. Arpad Plesch. (London: Stevens & Sons.) Pp. vii + 119. 7s. 6d.

THE U.S.S.R. AS A MERCHANT STATE.

THIS is an attempt¹ to describe and examine the constitution of the U.S.S.R. in its aspect as a merchant State, and therefore in particular in its relationships with other States of the more normal "capitalist" type. M. Stoupnitzky has collected much interesting and useful material which he sets out and examines from the point of view of an orthodox jurist of western European affiliation. His attitude is hostile to the Russian experiment on account of its, in his view, servile character, but his exposition and criticisms are reasonable and fairly made, and his work forms a welcome addition to the many studies of this fascinating subject which have recently appeared.

M. Stoupnitzky makes it clear that prototypes of the majority of the Russian institutions and methods can be found elsewhere and that there is an increasing tendency in the Russian direction in very many States—in Persia in particular the Government has taken full powers in connexion with commerce and industry, and, it might be added, that the same powers exist *de facto* in those countries which are under dictatorships. In Russia, however, matters have been pushed to such extreme limits that, in the author's view, an entirely new species of State has been produced. The relationships and contacts of this complicated organization with the more normal type of State naturally give rise to numerous juristic difficulties which it is the object of the work to examine. In order to carry out this investigation successfully, however, it is necessary for the author to give a fairly full description of the Russian economic constitution. This, in his view, is the fundamental aspect of the matter, for the whole object of the experiment is a complete economic statism and the institutions through which this policy is carried out are therefore of great importance. In some ways this is the most useful part of the book.

The volume is divided into five parts. In the first part M. Stoupnitzky examines the regulation of Russia's foreign trade through the various State and State-controlled organizations which have already been referred to. Here he is concerned with Russian municipal law, which is naturally full of contrasts with other systems.

In Part II he considers the repercussions of this system upon foreign countries, and in particular the various anti-Soviet trade boycotts and campaigns which have occurred in western Europe, and more particularly in France, U.S.A. and Great Britain. This section is rather thin and brings out what many would regard as the principal defect of the book, viz. its theoretical and doctrinaire character. The actual repercussions of the Soviet commercial system can in a number of aspects be very well studied in the English case-law which in many ways furnishes a more

¹ *Statut International de l'U.R.S.S. État Commerçant*. Par A. Stoupnitzky (avec Table des matières). (Paris : Librairie Générale de Droit et de Jurisprudence, 1936.) Pp. iv + 486. Frs. 50.

realistic criterion than the political propaganda of right-wing candidates and disgruntled merchants. Similar litigation has presumably taken place in other countries, but M. Stoupnitzky is silent about it all.

In Parts III and IV the position of the U.S.S.R. *vis-à-vis* governments which have not, and have, given *de jure* recognition is examined. Here numerous difficult problems are handled with knowledge and discrimination, and a number of cases which have been litigated in the French courts are referred to in connexion with a discussion of liability on trade contracts when there is no commercial treaty. These courts have apparently gone a long way towards holding that Soviet diplomatic representatives may be made personally liable upon contracts the negotiation of which they have handled.

In Part V various matters relating to the finance of Russian foreign trade are discussed. It is shown how Germany has financed the imports and the United Kingdom has financed the exports. This section has little of legal interest.

In one of the appendices there is an interesting specimen of the type of sales contract used for Russian purchases in France.

R. S. T. C.

AUSTRALIAN AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW.

THIS is the first volume of the *Proceedings* of the newly formed Australian and New Zealand Society of International Law,¹ and very properly devotes its first twenty-six pages to telling us about the Society, its officers, its rules, its activities and its branches. If it contained nothing more, we should give it a very hearty welcome as evidence of the determination of a group of leading men in these two Dominions to ensure that their new international status and their foreign policies shall be backed by an instructed public opinion. Professor A. H. Charteris, the President of the Society, has surrounded himself with an impressive body of lawyers and statesmen of distinction, and the contents of the volume show that they are not there in a purely honorary capacity, but that many of them are making their several contributions to the furtherance of the Society's aims.

Turning, however, to the scientific value of the volume, we find in the place of honour an article by the late and much-lamented Sir W. Harrison Moore upon "Separate Action by the British Dominions in Foreign Affairs." There are few, if any, lawyers in our Dominions who have seen from the inside so much of the great constitutional changes of the past twenty years and who have contributed so much to them as had the writer of this article. It throws light upon many of these changes, for instance, as to treaty-making, diplomatic representation and severance

¹ *Proceedings of the Australian and New Zealand Society of International Law*, Vol. I. (Melbourne University Press and Sir Humphrey Milford, Oxford University Press.) Pp. xxvi + 188. 10s. 6d.

of diplomatic relations, acquisition of territory and relations with the U.S.S.R. Then Sir John G. Latham deals with "Some Recent International Problems," mainly connected with the League of Nations. The Hon. Mr. Justice Evatt in an article of twenty-eight pages discusses the "British Dominions as Mandatories," and finds it necessary to deal with the wider and deeper questions of sovereignty, the nature of Dominion status, and the distinction between status and function, in the course of which he has something to say upon the views of certain writers whose aim is to minimize the extent of the new status which the Dominions have established.

Dr. A. Patkin in an article entitled "The Soviet Union in International Law" examines some of the many legal problems to which the development and policy of that State have given rise and its peculiar attitude towards international law, with the conclusion that "the *civitas maxima* and the isolated Soviet State are irreconcilable." It is daily becoming less isolated and its attitude towards international law must inevitably be modified.

Professor Charteris contributes an article on the "Position of Consuls in Australia," and Dr. T. P. Fry deals with certain "Italian Consular Incidents in North Queensland," which gave rise to trouble in and since 1928. Professor K. H. Bailey examines the position of Australia in relation to International Labour Conventions, with particular reference to the constitutional problems which their ratification and application involve. Similar questions are now under the consideration of the Supreme Court of Canada, and with the advent to the International Labour Organization of the United States of America it is evident that the difficulties of different Federal systems in contracting and carrying out international obligations will require a good deal of investigation in the near future.

Mr. G. B. Castieau examines "The Statutory Basis of Extradition in Australia," under which title he discusses extradition in the strict international sense and also the surrender of fugitive offenders as between the different portions of the British Empire and Commonwealth of Nations, including the Australian intercolonial arrangements. Mr. V. Le Gay Brereton writes upon the "Administration of Justice among Prisoners of War by Military Courts," and the Hon. Sir John Harvey, formerly an Official Visitor of Prisoners of War Camps in Australia, contributes from his personal experience a note on the "Duties of the Official Visitor" of these camps. The volume concludes with a note by Professor Charteris on the Kisch case which threw light upon the successful claims of "Scottish Gaelic" to be "an European language" for the purposes of a dictation test to be taken by a would-be immigrant of Czechoslovakian nationality!

We shall look forward to the annual appearance of a volume of these *Proceedings*. The great merit of the first volume, if we may say so, is that, since it opens up a new source of material, of nearly every article

one can say that it could not or would not have been written in this country, because either the material would not be available here or the point of view would be different. It is therefore a very welcome addition to the literature of international law.

ARNOLD D. MCNAIR.

POST-WAR TREATIES.

To students of post-war politics this collection¹ should prove invaluable. It is sponsored by the *Institut für Ausländisches Recht und Völkerrecht* of Berlin and contains, mainly in their original tongues, Treaties of Guarantee, Alliance, Political Collaboration, Non-Aggression and Neutrality made since 1918. It presents us, therefore, with a conspectus of the political efforts made in the post-war period to establish the "Security" which, though it constantly evades our pursuit, remains the desired object of English and French endeavours at least. General Smuts has recently stated that, in his opinion, the political approach to world peace and restoration has now been ruled out and that it is by the financial and economic approach that a hopeful solution is more likely to be found.² But, however this maybe, the story of the political strivings remains none the less interesting—and whether successful in securing peace or not, the treaties are bound to have repercussions which render the study of their texts necessary.

The collection under review opens with the Treaty of Guarantee between the British Empire and France, of June 28, 1919. The texts follow in chronological order, but tables and cross-references make it feasible to follow out each separate development. In one case, indeed, the strictly chronological sequence has been abandoned, but this is only where a treaty has been prolonged, renewed or replaced by another. In that case the later documents are ranged immediately after the earlier ones which they supplement or replace.

The latest documents included refer to the question of Sanctions and extend into the spring of the current year. This volume, however, is not designed to contain treaties or other documents aiming primarily at collective security through the League or concerned with that object. The mass of material relevant to that purpose will be contained in a second volume now in preparation. The present volume nevertheless contains a body of material of the greatest interest and importance. Even for those whose need of such collections as these is not urgent, there is interest in one which contains (*e.g.*) the Franco-Soviet Pact, the Czecho-Slovakian-Soviet Pact and a body of documents relating to the discussions as to the compatibility of the former with the Locarno Treaty.

F. M. G.

¹ *Politische Verträge, eine Sammlung von Urkunden*, herausgegeben von Viktor Bruns. Band I. (Berlin: Carl Heymann, 1936). Pp. 636.

² See *The Times*, October 13, 1936.

THE LAW OF NATIONS.

WE welcome the second edition of the brief but masterly Introduction to the Law of Nations by the Professor of International Law at Oxford.¹ The first edition appeared in 1928, and the book immediately made its mark by reason of its lucidity and sanity. It is the best introduction in the English language to modern International Law. The author has tried to give reasons for his belief that "the law of nations is neither a chimera nor a phantasy, but just one institution among others which we have at our disposal for the building up of a saner international order." It is significant of the new outlook that the introduction deals entirely with the topics of the law of peace, as it used to be called, and not with the law of war and neutrality. The subjects of the chapters are:

The Origin and Character of International Law; Character of the Modern System; the Legal Organization of International Society; States; the Territory of States; the Jurisdiction of States; Treaties; Disputes between States; International Law and Resort to Force.

Professor Brierly possesses the great gift, uncommon amongst international lawyers, of writing with equal brevity and clearness. Admirable, for example, is his discussion of the theory of sovereignty of States which "was invented and developed by political theorists who were not interested in, and paid practically no regard to, the relations of states with one another; and it is not only inconsistent with the subjection of states to any kind of law, but it is in fact an impossible theory for a world which contains more states than one."

The new edition deals with the disturbing events in international relations which have occurred during the last seven years. The author points out that Japan's defiance of the League in the dispute of 1931, and the hesitation of the Council in the face of it have impaired the authority and prestige of the Council in preventing war between members of the League. He throws doubt on the ruling, which was given at that time, that unanimity (including the votes of parties) is required for action under Article 11 of the Covenant in such cases; and expresses the hope that the question is not finally determined.

The little book may be recommended to all students, to all lawyers, and to all persons who wish to have an intelligent understanding of the legal relations of States.

N. B.

COLLECTIVE SECURITY.

THE inaugural lecture of Dr. McNair² in the Whewell Chair of International Law at Cambridge University manifests the same qualities as the book of the Professor of International Law at Oxford University—sanity

¹ *The Law of Nations: An Introduction to the International Law of Peace.* By J. L. Brierly. Second Edition. (London: Sir Humphrey Milford, Oxford University Press, 1936.) Pp. viii + 271. 5s. net.

² *Collective Security.* (London: Cambridge University Press, 1936.) Pp. 42. 1s. 6d. net.

and lucidity. It is marked also by an encouraging hopefulness. Pointing out that the Whewell Professor is particularly charged "to lay down such rules, and to suggest such measures as may tend to diminish war and finally to extinguish war between nations," the holder of the Chair examines the implications of the idea of collective security and the true place of force in a system of international law. The essential feature of the new international order is not that force is being abolished, but that it is being collectivized and denationalized. "The manner of its exercise remains national: the judgment which precedes and authorises its exercise is collective." He emphasizes that the collectivization of force is only one aspect of the collective system, and that the collective and peaceful revision of treaties is of at least equal importance. And he concludes: "If we are patient and hold firm to our declared policy, which comprises collective revision, eventually the principle of collective security will be established; though at first limited in territorial scope, it will spread, and it will introduce a new and saner epoch in international relations."

The faith of those who believe in international law has been seriously tested since these words were written. It is well that the masters of international law in England strengthen the faith.

N. B.

AMERICAN FAMILY LAWS.

THIS is the fourth volume of the remarkable and admirable work of which Professor Vernier published the first volume in 1931.¹ The volume before us comprises thirty-nine sections, dealing with all aspects of the legal relations between parent and child in the fifty-one jurisdictions surveyed. Among the earlier sections are those treating of the "custody, control, earnings, and property of the child," "emancipation," "the child's duty to support parents and other relatives," and "inheritance"; then follow nine sections on legitimacy and legitimation; after five sections on bastardy and seduction come eleven sections on adoption and its effects; and the survey closes with three sections on the legal consequences of torts committed by third parties against the parent or the child, or by parent and child *inter se*, and a section on step-children. The range of detailed research the results of which are conveyed in this volume is equalled only by the lucidity of the presentation.

The four volumes taken together form a monument of comparative law to which it would be difficult to find a parallel.

M. S. A.

¹ *American Family Laws: A Comparative Study of the Family Laws of the Forty-eight American States, Alaska, the District of Columbia and Hawaii* (to January 1, 1935). Vol. IV, Parent and Child. By Chester G. Vernier, assisted by E. Perry Churchill. (Stamford University Press, and Sir Humphrey Milford, Oxford University Press, 1936.) 22s. 6d.

LES NATIONS ANGLO-SAXONNES ET LA PAIX.

THIS is an original book ¹ written by a French publicist who has travelled much in England and America, and who is seeking to make known to his countrymen the character of the Anglo-Saxon peoples. He remarks that he has no case to prove but allows English and Americans with whom he converses on his travels to speak for themselves. He desires only to give information. The particular subject of his study is the attitude of the two Anglo-Saxon races towards international peace. It is hard for the Latin peoples, with their more logical and intellectual approach, to comprehend the moral and sentimental approach of the Anglo-Saxon peoples to international relations. The author is concerned to interpret that attitude for his countrymen in simple and lucid language, and by reporting actual conversations. He explains the latterday renunciation of Imperialistic ambitions in England: and the passion for isolation from the European tangle which dominates the post-War international policy of the United States. He examines the relations of France with the Anglo-Saxon powers, and his interpreter's neutrality is at least benevolent. He makes a strong point that nations have too much regard to past history in their estimate of present relations, and that it is to be regretted that more attention is not given in the schools and universities to the study of the last twenty years of world history. The relations between nations may undergo radical change in two decades. The repetition of old clichés about the conduct of nations and the serving up of old prejudices are an obstacle to good understanding.

There is nothing new, nothing learned and nothing dramatic in this little book. It is deliberately a piece of popularization; but it is intelligible to the common man; and it should help to explain the riddle of the Anglo-Saxon man of action to the French man of intellect.

NORMAN BENTWICH.

THE LAW OF AGENCY.

THERE is surely no other topic in English law which has provoked greater interest among continental jurists than the law of agency. It is not quite easy to say why that should be so, but the fact that it is so cannot be denied. A continental lawyer wishing to make himself acquainted with the English law of agency has a choice of valuable books to which to turn, which is simply amazing. Besides such books as Schirrmester-Prochownik, S. Goldschmidt and others, which treat the entire English law of contracts, he has not only excellent works at his disposal which deal with the modern law of agency such as Delangle, Langenbach, Popesco-Ramniceano, but there is a similar wealth of works on the general aspect of the law (Lévy-Ullmann), on its history (Würdinger) ² and on its relation to continental reform movements (Müller-Erzbach).

¹ *Les Nations Anglo-Saxonnes et la Paix*. By Charles D. Herisson. (Paris: Recueil Sirey, 1936.) Pp. 204.

² See 50 L.Q.R. p. 431.

Dr. Hartmann's work¹ is a valuable addition to this series. It deals with only one special aspect of the law, namely the relation of the parties where the existence of the principal is undisclosed. The first half of the book gives a good statement of German law on the topic, the second an equally correct survey of English law. The author's hope that the book may be used by English lawyers who want information on German law will scarcely be fulfilled. The book is written too much from the point of view of German lawyers and it would probably be hard for any foreigner, unacquainted with the German method of reasoning, to follow the author through his arguments on some of the questions of construction dealt with by him.

The author has, however, not confined himself to a mere statement of the law as it stands. He offers a contribution to German debate on legal reform. His views seem remarkable for their soundness and their freedom from bias. There is a distinct tendency in German law to look upon the English law of agency as perfection itself. Dr. Würdinger has said that the English law on agency as to an undisclosed principal showed a most intelligent understanding of the economic interests involved and Professor Müller-Erzbach has held out English law as a model to be followed by continental laws. Such an uncritical attitude is rightly and severely criticized by the author. He points out that originally the courts did not allow the third party to sue the principal and that later they were induced to do so only by the argument that principal and agent were identical in law. This fictitious identity was, as Mr. Justice Holmes has shown, subsequently applied indiscriminately to all cases of agency, instead of being confined to those cases in which the agent openly acted as such for the principal. Dr. Hartmann seems to be right in stating that there is an anomaly in the English law of agency on behalf of an undisclosed principal, which was rightly felt by the jury in the old case of *Scrimshire v. Alderton*² and he is justified in endorsing Holmes' view that "common sense is opposed to allowing a stranger to my overt acts and to my intentions . . . to set up a contract against me which I had supposed I was making with my best friend."

E. J. COHN.

THE AMERICAN RESTATEMENT OF THE LAW OF CONTRACTS COMPARED WITH THE FRENCH LAW.³

THIS is an extremely valuable work of comparative law, and its high quality is indicated by the fact that it was *couronné par la Faculté de Droit de Paris*, and secured for its author the *Prix Rossi* in 1935.

The American Restatement is perhaps receiving in this country less attention than it deserves. It is hard for us to realize how completely the

¹ *Das Ausführungsgeschäft im deutschen und englischen Kommissionsrecht.* By Dr. jur. Hans R. Hartmann.

² (1743) 2 Strange 1182.

³ Madray, Gilbert, *Des Contrats.* (Paris: Librairie Générale de Droit, 1936.) Pp. 310.

lawyer in America is smothered with law reports. The output of the courts of forty-eight States plus that of the Federal courts is staggering. It is said that in 1917 there were published in the United States 175,000 pages of reported decisions as compared with 7,000 in Great Britain. The aim of the authors of the restatement is to study and clarify this mass of decisions.

They disclaim any intention to make new law. If the decisions upon a particular point agree with one another, the rule is so laid down in the restatement. If, however, there is a conflict, that view is chosen which most commends itself to the "restaters." The restatement as such will have no power to bind any court, but its persuasive effect ought to be considerable.

The authors of the restatements are in fact doing in a few years a work analogous to that done in France during two centuries or so by the writers from Du Moulin to Bourjon, who brought into existence the *Droit commun coutumier*. The French writers surveyed the various *coutumes* and disengaged from them the rules which prevailed in most of the *coutumes*, or which seemed to the writer to be the best. The authors of the restatements are doing much the same with the American decisions. If American law should ever be unified these restatements will be invaluable as a basis. But the individualism of the States is a sturdy plant. M. Madray's book will be of great service to those students who are interested in comparing the French law with the common law. Brief as the book is, it is packed with matter.

The writer agrees with Professor Lévy-Ullmann that in this field of law the differences between the common law and the Continental law are much more matters of form than of substance. This is consoling to those who believe that law is not so far divorced from reason as some people suppose.

F. P. W.

TREASURE TROVE.

THE English habit of adapting old laws to new uses is neatly illustrated by our system of treasure trove. Modern interest in archaeology demands that any discovery of antiquities be reported and that the State have the chance to secure the discovered objects for public inspection and study. Laws to this effect have been enacted in Palestine, Cyprus, Egypt, Iraq and elsewhere as part of an enlightened policy of conserving antiquities. In England we are still content with the almost prehistoric machinery of the coroner's inquest. The Coroners Act of 1887 reproduces the thirteenth-century provision stated by Bracton and formulated in the *Statutum de Officio Coronatoris*. The coroner is to inquire of treasure that is found, who are the finders and who suspected thereof. Anciently the King asserted his regality and claimed ownerless hoards of gold and silver, useful for his mint. Nowadays, the State encourages the finder to report his discovery by offering him the full market value if the objects are retained for the Crown or a museum; if not so retained, they will be

restored to the finder, and, if he wishes, the British Museum will sell them for him at the best possible price. Such is the purport of administrative regulations issued by the British Museum in 1931, with the sanction of the Treasury. They explain that the finder must first report his find promptly to the local coroner; they add that the coroner is not concerned with coins or other objects of any other metal than gold or silver. Here the law of Scotland (where the Crown's right has somehow been extended to articles of bronze, copper and other metals) differs from that of England. Other countries have their own special provisions. All this is admirably set forth in Sir George Hill's scholarly, attractive and comprehensive book on *Treasure Trove*¹; it surveys the law and history from the dawn of civilization to the present day and from China to Peru. As director of the British Museum, he would like to see the legal definition of treasure trove in England enlarged to cover antiquities of all kinds. The fact that objects are made of precious metals hardly justifies special treatment to-day.

Folk-lore knows the taboo placed upon the disturbance of buried treasure—the dragons guarding the hidden gold. Plato in the *Laws* echoes the Solonian prohibition against people taking up what they did not put down; the disposition of the treasure (and the punishment for lifting it) he would leave to the Delphic oracle. A simpler view is that the finder deserves his luck, and that the gods of the earth are recognizing his religious merit. In more sophisticated times the King, the landowner and the finder have their respective claims. In England the right of treasure trove, like the right of wreck or deodands, has been a franchise conferred upon favoured persons or bodies. The cities of London, Rochester, Bristol and Waterford received it; so also did various bishoprics and abbeys; Eton College was granted it in 1442 and King's College, Cambridge, two years later. In the county palatinates, where the King's writ did not run, the rulers enjoyed treasure trove with the other *jura regalia*. It is tempting to look for parallels in the general grants of royal privileges to companies trading overseas, e.g. the charter of the Newfoundland Company in 1610. The duchy of Cornwall had no express grant, but it claims (and is allowed to have) the property of treasure within the county. Sir George Hill gives a list of the specific grants of treasure trove.

According to the judges in the *Saltpetre Case* (1606) the King can dig for treasure trove in his subjects' lands. He has the property; he owns the treasure before it is found. Hence he can license persons to dig; thus in 1237 the Earl of Cornwall and Poitou had orders *quod fodi faciat hogas in comitatu Cornubiae*. The *hogae* (howes or barrows) in Cornwall and elsewhere must have suffered treatment to make modern archaeologists weep. Sir George Hill's list of such grants comes down to 1630; he also

¹ *Treasure Trove in Law and Practice from the Earliest Times to the Present Day*. By Sir George Hill, K.C.B., F.B.A. (London: Sir Humphrey Milford, Oxford University Press, 1936). Pp. ix + 311. 21s. net.

notes the post-Restoration licences such as the authority to Prince Rupert to excavate Cocklom Hill in Staffordshire. Pepys tells us how, under royal warrant, he himself dug in a cellar in the Tower for Barkestead's £50,000 hidden in butter firkins. This would not have been treasure trove proper since the original owner would be known. Nor, it seems, would King John's treasure if recovered from the Wash. The optimistic project, described in *Ponsonby v. Boone* two years ago, shows that the Crown is still willing to grant the right of search. If the project had succeeded, the Crown would have claimed John's treasure as corporate successor of the original owner and not merely in virtue of the King's prerogative. Sir George Hill's fascinating study leads, it will be seen, into curious by-ways. His book is packed with learning, but happily he can present the fruits of his research without destroying the romance of his theme.

C. T. C.

DIPLOMATIC COMMENTARIES.¹

THE original Japanese version of this book, published in 1931, contained twenty-one chapters, but eight of these have been omitted in the translated edition. A short summary of their contents is given in the editor's preface, and this summary will probably lead many readers to question the wisdom with which the editor has exercised his discretion. To the reviewer it would certainly be of interest to have had the opportunity of reading a full statement of Viscount Ishii's views upon such problems as the relations between military and civil authority, the value of alliances, or the practice of international conferences.

In the result we are given a seriously mutilated book, but what has been preserved will be of great help in enabling Western readers to understand the Japanese point of view. Most of us are so ignorant of Japanese history that we have reason to be grateful for the chapters which present Japanese diplomacy in its proper historical context. The author's insistence upon the importance of historical study rests upon his view that there is a certain permanence in national characteristics which causes history continually to repeat itself. For example, Russian unreliability is contrasted with British reliability, and both are regarded as constant elements in the national character of each people.

A chapter of particular interest is that which analyses the three stages of the Anglo-Japanese alliance. In general, it may be said that the historical part of the book is the most valuable. In other respects the author's views are clearly coloured by the influences which were dominant at the time when he wrote, and they may well have changed in the years which have intervened. Few Japanese authors to-day would be prepared to describe the League of Nations as "the highest organ of peace" or to regard its future as "full of promise" (p. 169). Anti-Japanese writers

¹ By Viscount Kikujiro Ishii; translated and edited by W. R. Langdon. (Baltimore: Johns Hopkins Press; London: Sir Humphrey Milford, 1936.) Pp. xxiv + 351. 15s.

will doubtless find satisfaction in noting that Viscount Ishii, writing in 1930, declared with emphasis that "it is arbitrary and baseless to hold that Manchuria is outside of China" (p. 30). In the passage from which this sentence is quoted the author is disputing the German interpretation of the word "China" in the Agreement of 1900, and describes this interpretation as "clearly a perversion of the agreement." Such passages prompt us to regret the translator's omission of the chapter in which Viscount Ishii ventured to predict the future course and character of diplomacy.

H. A. SMITH.

THE LAW OF PEACE.

THIS book of a Dutch Professor of International Law,¹ who died in 1933, was well worth translating into English, because it has a character of its own. It is a history of the International Law of Peace from the beginning of the Middle Ages to 1932, written from a particular point of view. It aims to show that until our time there was not a positive International Law of Peace which was regularly observed. But there has been a steady evolution; and the writer shows how the idea of peace which is embodied in the Covenant of the League may be made a reality, if the nations will it. In the past the law has been much lauded but not observed. "The keystone of the system established in the Peace Treaties of 1919 is the sincere determination on the part of the States—manifest in their acts—to submit their national interests to the international interest, to subject their national aspirations to the rule of international law. A purpose of this kind implies that States are prepared to admit a real international supervision over their actions, involving administrative, judicial and policing control."

The book is very good reading; for although it is packed with learning, the authorities are so well digested and the many facts so combined in the writer's synthetic mind that it is free from the three cardinal weaknesses of much writing about International Law: pedantry, verbosity and unreality. That the learning is behind each statement is proved by the notes appended to each chapter, which show a remarkable range of reading.

The author strives to show that the elements of a positive system of an International Law of Peace are to be found in the first developments in the Middle Ages. International administration, international arbitration and an international magistrature are to be discerned in the period before Sovereign States were established. For each period before the last he divides his survey under four heads. The facts; hopes raised; critical analysis; and hopes dashed. The last section, which is rather a prophecy than a history of peace, is divided into four different heads: the facts; achievements; dangers ahead; and lingering hopes. Had he lived till to-day, the last subsection might well have been again:

¹ *The Law of Peace*. By C. van Vollenhoven. Translated by W. Horsfall Carter, with a Preface by Jonkheer W. J. M. van Eysing. (London: Macmillan & Co., Ltd., 1936.) Pp. xvi + 261. 10s. 6d. net.

"hopes dashed." Yet it is the essence of his critical study that it is dominated by a forward-looking mind. He sees the hope of International Law and civilization in an effective application of Article 11 of the Covenant which lays down that it is the duty of the League—as distinct from the States members of the League—to prevent and bring about a cessation of armed conflict. He realizes that what has been lacking in these last years is a serious education of the masses of the people about the problems of peace. "Men hope to traverse at a bound the distance between the continuing anarchical situation of the present world and the reign of peace. They forget that a lasting peace must be organised, as after 1492 the modern State had to be organised."

The translator, Mr. Carter, has done his work well, and introduces the book as his modest contribution to the controversy on the future of the League. It is not too much to say that the book is in the spirit of the great *Grotius*.

NORMAN BENTWICH.

PENAL CODE OF CHINA.

THE translator,¹ in his valuable introduction, summarizes the reasons why the Chinese Penal Code of 1928 had so soon to be replaced by a new one: the reform of 1928 contained, in fact, only slight improvements upon the Code of 1912 without making sufficient use of the new ideas to be found in post-war European penal legislation. Moreover, an adaptation of the Penal Law to the Civil Code and the Code of Commerce of 1929-30 was necessary. And last, but not least, the theories of Sun Yat Sen concerning constitutional and social legislation had in the meantime been given form distinct enough to admit of a closer contact with the fundamental principles of the Penal Code. One example of the difficulties of this last task may suffice. According to the Code of 1928 only the wife's adultery was punishable. As, however, Art. 6 of the Constitution of 1931, in harmony with the doctrines of Sun Yat Sen, removed any legal differentiation between the sexes, the women's leagues started a campaign which succeeded in making punishable the husband's adultery too (Art. 239 of the new Code). This reform, in consequence of the practice of the cult of ancestors—the principal aim of the Chinese marriage—may lead to difficulties in the case of a husband who has no sons by his legitimate wife.²

In the general part of the Code, the following points seem to deserve special attention: The principle *nulla poena sine lege* has been maintained (Art. 1). The provision dealing with mistake of law (Art. 16) has been considerably improved by the addition of a clause according to which

¹ *Code Pénal de la République de Chine. Traduit du Chinois avec une Introduction et des Notes par Ho Tchong-Chan.* (Imprimerie de l'Orphelinat de T'ou-Sè-Wè, Zi-Ka-Wei près Changhai. Librairie du Recueil Sirey, Paris, 1935). Pp. xxv + 110.

² For a fuller discussion of this point see the admirable essay of M. Padoux, "Conseiller juridique du gouvernement national de Nankin," *Revue internationale de Droit pénal*, 12. vol., 1935, pp. 211 et seq.

the prisoner may be acquitted if he believed for good reasons that his action was permitted by the law. Mistake of fact is not explicitly dealt with. As regards the treatment of children and young persons, Art. 18, following the example of many European Codes, extends the range of absolute penal irresponsibility up to fourteen years of age (previously thirteen years), whilst in the case of juveniles between fourteen and eighteen years (previously thirteen to sixteen), as well as of persons above eighty years, the punishment may be mitigated. "The punishment of children under fourteen years of age"—says the editor—"has been regarded as neither desirable nor effective." Instead of punishment, reformative measures (detention in a reformatory school) may be substituted (Art. 86). On the other hand, the provision dealing with insanity (Art. 19) has not been improved: the Code, following the French method (Art. 64 Code Pénal), restricts itself to the statement that an action committed by an insane person is not punishable, without attempting to give a definition of insanity. In the case of feeble-mindedness, the penalty may be mitigated (Art. 19 II). Moreover, there is now no explicit provision made for crimes committed in a state of drunkenness, the former Article 32 to the effect that drunkenness is no excuse in criminal law being omitted. As the editor explains, it is left to the courts to decide in each individual case whether or not the actor, according to the degree of his drunkenness, should be regarded as feeble-minded in the sense of Art. 19 II—an explanation which shows that the Chinese conception of feeble-mindedness is in harmony not with that of the English Mental Deficiency Acts of 1913 and 1927, but with the corresponding Continental conceptions. A problem causing trouble in legal systems the Codes of which do not contain an explicit provision has been tackled by the new wording of Art. 21 II: A criminal action committed by a public official by order of his superior is not punishable, unless the official knew that the order was contrary to the law. How is it, however, if the official, although knowing that the order was unlawful, thought himself bound by the order? To such a case, it is submitted, Art. 16 may be applied according to which the penalty may be mitigated (see above).

Of preponderating importance, however, is the fact that the new Code, following the example of all the post-war European Codes, introduces for the first time a complete system of measures of prevention and protection in addition to punishment (see Introduction, pp. xxiii *et seq.*): The courts are empowered to order the detention in reformatories, mental hospitals, asylums for inebriates, workhouses, etc., of children, of insane, mentally deficient, inebriate or habitual offenders respectively (Art. 86-90). Unfortunately the maximum period of detention in the case of drunkards is only three months (Art. 89), and in the case of an insane or feeble-minded offender three years (Art. 87). The establishment of the new institutions and of the staff necessary for the carrying out of these various methods of reformation and protection, as the editor duly emphasizes (p. xxiv), will probably take a considerable time.

The Code, as did also its predecessor, has adopted the Continental system of conditional sentence instead of the English system of probation without sentence. Its application, however, is still rather restricted (Art. 74 *et seq.*).

Conditional liberation can be granted after the prisoner has served one-half of his sentence (at least one year), or in case of a life sentence after ten years' imprisonment (Art. 77). Corporal punishment, in spite of serious attempts at its reintroduction, remains abolished.¹

Of interest, too, are the provisions concerning the payment of fines. Payment is not due until two months have elapsed after the final judgment, and there is no imprisonment in case of non-payment, but the prisoner has, instead, to do a fixed amount of labour (Art. 42), a system which is also in force in Soviet Russia and to a very limited extent in some parts of Germany.

Unfortunately, my space available does not permit of a comprehensive review of the innovations contained in the Special Part of the Code. As a whole, the penalties imposed for the various offences are not excessive. Only in exceptional cases, as, for instance, in the section dealing with violations of the laws concerning the traffic in opium, morphia, cocaine, etc., are the penalties increased.²

The section dealing with homicide has been improved by the abolition of the distinction between murder and manslaughter; the court, at its discretion, may choose between the death penalty, imprisonment for life and imprisonment for no less than ten years (Art. 771). Moreover the lenient penalty for infanticide which could previously be applied only in favour of an illegitimate mother has now been extended to the legitimate mother (Art. 274). New is the penalty for the transmission of venereal diseases or leprosy through sexual intercourse (Art. 285). Of particular interest as a proof of the changes in the Chinese public opinion is Art. 286, which imposes penalties upon every one who, by artificial means, hinders the natural development of the body of a child. The editor explains that this provision is particularly directed against the habit of crippling the feet of Chinese girls, "*que le gouvernement n'a cessé de combattre depuis l'avènement de la République.*" The new Art. 296 extends the penalty for slavery to every action by which a position analogous to slavery is established. The editor mentions as examples of such analogies the abuses to be found in certain houses of prostitution and some forms of maltreatment of women and children. It may, however, be doubtful whether the courts will always be able to find the right interpretation of the rather vague conception "analogous to slavery."

In the section dealing with sexual crimes the full protection of young girls against sexual intercourse is now limited to the age of fourteen years, instead of sixteen years, as previously (Art. 221). Girls between fourteen and sixteen years, however, are not entirely

¹ See Padoux, pp. 215-6; the Editor, p. xvi.

² Art. 256 *et seq.*, and special decrees of May 29 and June 5, 1935.

left without the protection of the Code, the penalty being only reduced (Art. 227).

The reviewer is not in the position to check the reliability of the translation. It must, however, be emphasized that the style, in general, is very readable and seldom gives rise to doubts. One single exception may perhaps be made: the translation of Art. 13, which contains the definition of *dolus*—although it makes clear that there is no longer a presumption of *dolus* in Chinese penal law—gives no distinct idea of the differentiation between *dolus directus* and *dolus eventualis*—a differentiation which is obviously intended in the two paragraphs of this Article. This, however, may be the fault, not of the translator, but of the legislator, and cannot diminish our debt of gratitude for this work which, as did the excellent translation of the Code of 1928 by Professor Jean Escarra of Paris, renders possible our study of an interesting and important piece of modern penal legislation.

HERMANN MANNHEIM.

We have also to acknowledge: ¹

The League of Nations and the Rule of Law, 1918-1935. By Sir Alfred Zimmern. (London: Macmillan & Co., Ltd.) Pp. xi + 527. 12s. 6d.

The Main Institutions of Jewish Law. Vol. I. The Law of Property. By Rabbi Dr. Isaac Herzog. (London: Soncino Press Ltd.) Pp. xxvii + 416. 10s. 6d.

Neutrality. Vol. I, The Origins; by Phillip C. Jessup and Francis Deak. Vol. II, The Napoleonic Period; by W. Alison Phillips and Arthur H. Reede. Vol. III, The World War Period; by Edgar Turlington. Vol. IV, To-day and To-morrow; by Phillip C. Jessup. (London: Sir Humphrey Milford, Oxford University Press.) Vols. I, II and III, 18s. 6d. each; Vol. IV, 14s.

Income Tax Codification Committee Report. Vols. I and II. Cmd. 5131 and 5132. (London: H.M. Stationery Office.) 8s. and 4s. 6d.

Mining Royalties and Rents in the British Empire. (London: Imperial Institute.) Pp. 183. 3s. 6d.

Medieval Representation and Consent. By M. V. Clarke, M.A., F.S.A. (London: Longmans, Green & Co., Ltd.) Pp. vii + 408. 18s.

State Papers, 1931. Vol. 134. (London: H.M. Stationery Office.) Pp. xvii + 1329. £1 15s.

Judicial Precedent in Scots Law. By John C. Gardiner. (Edinburgh: W. Green & Son, Ltd.) Pp. xx + 108. 5s.

The Jurisprudence of Holland by Hugo Grotius. Vol II. Commentary. By R. W. Lee, D.C.L., F.B.A. (London: Sir Humphrey Milford, Oxford University Press.) Pp. xlvii + 375. 30s.

Roman Law and Common Law. By W. W. Buckland and A. D. McNair. (London: Cambridge University Press.) Pp. xviii + 353. 15s.

Supplement to the Law and Procedure of International Tribunals. (London: Sir Humphrey Milford, Oxford University Press.) Pp. xx + 231. 18s.

¹ Mention here does not preclude a review later.

- Trusts on the Continent of Europe.* By F. Weiser. (London: Sweet & Maxwell, Ltd.) Pp. viii + 103. 7s. 6d.
- Alternative to Rearmament.* By Jonathan Griffin. (London: Macmillan & Co., Ltd.) Pp. xii + 215. 6s.
- Government Publications and their Use.* By L. F. Schmeckebier. (Washington: The Brookings Institution.) Pp. xiii + 446. \$3.
- Coutumes Algériennes.* By René Maunier. (Paris: Les Editions Domat-Mont Chrestien.) Pp. 202.
- L'Empire Fasciste.* By Marcel Prélôt. (Paris: Librairie du Recueil Sirey.) Pp. 258. Frs. 24.
- La Faillite en droit Anglo-Saxon.* By Charley del Marmol. (Paris: Librairie Générale de Droit et de Jurisprudence.) Pp. xxviii + 440. Frs. 40.
- Le Droit Chinois.* By Jean Escarra. (Paris: Librairie du Recueil Sirey; Peiping: Henri Vetch.) Pp. 574. Frs. 95, Ch. \$18.
- Die Alte afrikanische Kirche.* By Dr. Robert Höslinger. (Wien: Verlag Augustinus-Druckerei.) Pp. 78. R.M. 5.20.
- Die Österreichische Völkerbundanleihe.* By Dr. Arpad Plesch and Dr. Martin Domke. (Zurich: Polygraphischen Verlag.) Pp. 143. Frs. 3.50.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchèqueoslovaque; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchèqueoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudencia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.